92-1810

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

I. HYEON SU, *et al.*,

Petitioners,

v.

M/V SOUTHERN ASTER, *et al.*,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

Civil Appeal Nos. 90-35618, 90-35879, 91-35375

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Ninth Circuit erred when it affirmed the judgment of the district court holding that an extraterritorial discharge of a seaman prohibits the application of the Seaman's Wage Act when the wrongful withholding of wages occurred while the seamen was on a foreign vessel in a harbor of the United States.

LIST OF ALL PARTIES TO THE PROCEEDING

Petitioners

Plaintiffs Jo Seong Gu, Gim Yeong Ho, Bag Han Kil, Pyeon Yun Su, Son Chi Il, Park Sung Ok, Ka Chae Ho and Chu Chae Sok.

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Respondents

M/V Southern Aster, *in rem*, and Southern Aster Navigation, S.A., *in personam*.

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PROCEEDINGS IN THE CASE BELOW

The district court opinion in *Su v. Southern Aster* is reported at 767 F.Supp. 205 (D.Or. 1990). The court of appeal opinion was handed down on October 14, 1992, and is reported at 978 F.2d 462 (9th Cir. October 14, 1992); petition for rehearing denied on December 9, 1992.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Ninth Circuit, sought to be reviewed herein, was issued on October 14, 1992; application for rehearing was denied on December 9, 1992. The jurisdiction of this Honorable Court is predicated on 28 U.S.C. § 1254, Writs of Certiorari to the United States Courts of Appeals.

AUTHORITIES CONSIDERED

46 U.S.C. § 10313, in pertinent part (set forth in its entirety in the appendix), reads:

* * *

> "(e) After the beginning of the voyage, a seaman is entitled to receive from the master, on demand, one-half of the balance of wages earned and unpaid at each port at which the vessel loads or delivers cargo during the voyage. A demand may not be made before the expiration of 5 days from the beginning of the voyage, not more than once in 5 days, and not more than once in the same port on the same entry. If a master does not comply with this

subsection, the seaman is released from the agreement and is entitled to payment of all wages earned. Notwithstanding a release signed by a seaman under section 10312 of this title, a court having jurisdiction may set aside, for good cause shown, the release and take action that justice requires. This subsection does not apply to a fishing or whaling vessel or a yacht.

(f) At the end of a voyage, the master shall pay each seaman the balance of wages due the seaman within 24 hours after the cargo has been discharged or within 4 days after the seaman is discharged, whichever is earlier. When a seaman is discharged and final payment of wages is delayed for the period permitted by this subsection, the seaman is entitled at the time of discharge to one-third of the wages due the seaman.

(g) When payment is not made as provided under subsection (f) of this section without sufficient cause, the master or owner shall pay to the seaman 2 days' wages for each day payment is delayed . . .

* * *

(i) This section applies to a seaman on a foreign vessel when in a harbor of the United States. The courts are available to the seaman for the enforcement of this section."

STATEMENT OF THE CASE

The case was commenced originally as a claim in admiralty by Plaintiffs both individually and through their union, the Federation of Korean Seafarer's Union, to

recover unpaid wages, penalty wages and other damages for the crew of the M/V SOUTHERN ASTER. The Union has elected not to pursue review in this Court, and so now only the individual plaintiffs Jo Seong Gu, Gim Yeong Ho, Bag Han Kil, Pyeon Yun Su, Son Chi Il, Park Sung Ok, Ka Chae Ho and Chu Chae Sok are before the Court in this matter.

The named Defendants are the vessel M/V SOUTHERN ASTER, *in rem*, and the vessel's owner Southern Aster Navigation, S.A., *in personam*. For purposes of this application for review, the actual facts are not in dispute. Review in this case centers around the question of whether or not 46 U.S.C. § 10313 inures to the benefit of foreign seamen where the wrongful conduct complained of occurred while Plaintiffs were on board a foreign flag vessel in a harbor of the United States, and the seamen-Plaintiffs delayed in bringing their action until they had been discharged in a foreign port and returned to their home country. It is undisputed that Plaintiffs are domiciliaries of the Republic of Korea. It is further undisputed that the M/V SOUTHERN ASTER is a foreign flagged vessel, flying the flag of Panama, and it is owned by Southern Aster Navigation, S.A., a foreign corporation, not domiciled in the United States. Each Plaintiff joined the M/V SOUTHERN ASTER in a port of Japan and at that time executed shipping articles in accordance with the law of Panama, the flag of the vessel, and International Labor Convention No. 22. During the time of Plaintiffs' service on board the M/V SOUTHERN ASTER, the vessel traded exclusively between Japan and the United States, making eight separate voyages to the United States. During the entire time of Plaintiffs' service on

board the M/V SOUTHERN ASTER, they were not paid the wages in accordance with the shipping articles, but were paid at a lesser rate despite Plaintiffs' request for half wages each time the vessel called upon a United States port and full wages at the termination of each of those voyages. In order to receive any wages, Plaintiffs were required to sign two sets of portage bills or wage receipts monthly, one set falsely acknowledging receipt of the amount of wages due under the shipping articles, and the other reflecting the actual amount paid to each Plaintiff. This practice has been called "keeping double books."

Because of this wrongful withholding of wages by the owners and master of the M/V SOUTHERN ASTER, and as a result of international maritime law and American general maritime law principles, Plaintiffs brought an *in personam* action against the owner and also alleged that a maritime lien had arisen against the vessel. The M/V SOUTHERN ASTER was present in the United States, more particularly within the territorial jurisdiction of the district court, at the commencement of the action. The M/V SOUTHERN ASTER with seamen-Plaintiffs aboard entered U.S. ports on eight separate occasions; each and every time there was a wrongful withholding of wages in violation of 46 U.S.C. § 10313(e) and (f).

In addition to the action for wages and to enforce a maritime lien against the vessel M/V SOUTHERN ASTER, Plaintiffs brought tort claims. Defendants moved to dismiss Plaintiffs' claims under 46 U.S.C. § 10313 pursuant to F.R.C.P. Rule 12. That motion was granted by the district court and affirmed on appeal. Defendants' additional motion to dismiss the remaining claims under the

doctrine of *forum non conveniens* was also granted. Plaintiffs seek review of the motion to dismiss the claims under 46 U.S.C. § 10313, and the motion to dismiss for *forum non conveniens*.[1]

ARGUMENT IN FAVOR OF GRANTING PETITIONERS' APPLICATION FOR WRITS

Rule 10 of the Rules of the Supreme Court provides that one of the special and important reasons for granting a writ of certiorari to review a court of appeal decision is when a United States Court of Appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter.

The Court of Appeals has created a direct conflict between the Ninth Circuit and the United States Court of Appeals for the Fourth Circuit in *Fitzgerald v. Liberian S/T Chryssi P. Goulandris*, 582 F.2d 312 (4th Cir. 1978), and *Heros v. Cockinos*, 177 F.2d 570 (4th Cir. 1949), when it held extraterritorial discharge renders the wage statute inapplicable. The Court of Appeals relied upon on dicta in *Monteiro v. Soceidad Maritima San Nicolas S.A.*, 280 F.2d 568 (2d Cir. 1960), but misconstrued Judge Friendly's holding and refused to follow the controlling opinions of

[1] No argument is made herein regarding the motion to dismiss for *forum non conveniens* of the additional claims brought along with the claims under 46 U.S.C. § 10313. This issue is merely preserved for reconsideration by the district court in the event of reversal as the wisdom of a *forum non conveniens* dismissal should be reconsidered by the district court if it must exercise jurisdiction over the wage claims.

the Fourth Circuit referenced above. The Ninth Circuit properly noted that district courts in both the Fifth and Ninth Circuits have reached contra results involving the same issue.

This decision substantially affects a rule of national application which affects uniformity of the maritime law. Because the decision of the panel conflicts with other circuits, it destroys the uniformity sought in the maritime law. See *Miles v. Apex Marine Corp.*, ___ U.S. ___, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990).

EXTRATERRITORIAL DISCHARGE

The trial court dismissed the plaintiffs' wage claims pursuant to a Rule 12(b)(6) motion to dismiss and, as such, was solely a ruling on a question of law. The trial court held, " . . . the statute clearly requires discharge in a U.S. port as a jurisdictional prerequisite." The Ninth Circuit affirmed holding that " . . . logic dictates that full wage provision should not apply to foreign seafarers discharged from foreign ships in foreign ports." Strangely, the Ninth Circuit's concluding paragraph in its portion of the opinion dealing with, "Foreign seafarers discharged in foreign ports" implies a different result:

> "It is also unclear what wrongful conduct the shipowners engaged in while in a United States port. The Act imposes harsh penalties only for specific, well-defined conduct: the wrongful withholding of wages. Until that occurs, the Act's protections are unavailable. *For those seamen discharged overseas, that prohibited*

> *conduct did not occur in a United States port.*" [Emphasis added.] 978 F.2d at 471-72.

Contrary to the Ninth Circuit's holding that the "prohibited conduct" of the wrongful withholding of wages did not occur in a United States port, the record unequivocally establishes that the M/V SOUTHERN ASTER was in U.S. ports on eight separate occasions with plaintiffs on board, and each and every time there was a wrongful withholding of wages in violation of 46 U.S.C. § 10313(e) and (f). The record further unequivocally establishes that these wrongful withholdings of wages were part of defendants' double bookkeeping scheme requiring plaintiffs to execute fake wage receipts for the wages to which they were entitled under the shipping articles. A 12(b)(6) motion to dismiss is determined on the face of the complaint, requires that any doubt as to factual allegations to reside in favor of the plaintiff, and the ruling is on a question of law. *Conley v. Gibson*, 355 U.S. 41 (1957).

A reading of the district court's opinion coupled with that of the Ninth Circuit gives the clear impression that the Ninth Circuit intends that the wage statute should not apply to foreign seamen discharged in a foreign port, even when the wrongful withholding of wages occurs in a United States port. This interpretation of the wage statute is incorrect and in conflict with numerous other circuit courts of appeal. The Ninth Circuit opinion holds that even if a foreign seaman makes a demand for one half wages under subsection (e), and the master refuses that demand, and even though the seaman is entitled to full wages under subsection (f) and penalty wages under subsection (g), the benefits of those subsections will all be

denied unless the plaintiff is additionally physically discharged in a United States port. As such, the Ninth Circuit's opinion attempts to graft upon the statutory language the requirement that the seaman obtain a discharge in the same U.S. port. There is no such language in the statute and the previous jurisprudential interpretation of subsection (e) and subsection (f) have been exactly to the contrary. Indeed, the present immigration law of the United States prohibits the discharge of foreign seamen in a U.S. port.[2]

This in fact was the exact holding of *Heros v. Cockinos*, 177 F.2d 570 (4th Cir. 1949); wherein the foreign plaintiff's discharge in Spain did not prevent the application of 46 U.S.C. § 599 nor 46 U.S.C. § 597 (46 U.S.C. § 596 and § 597 being incorporated in 46 U.S.C. § 10313; and 46 U.S.C. § 599 being incorporated in 46 U.S.C. § 10314). The plaintiffs were 11 Greek seamen who signed on a Greek vessel whose suit was dismissed by the district court for lack of jurisdiction because the Greek seamen "did not return with the vessel on the voyage which ended in the waters of the United States and were not present here when the suit was instituted." In reversing and holding there was

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[2] See 8 U.S.C. 1281, *et seq.*, specifically 8 U.S.C. 1286: "Discharge of alien crewmen; penalties

> It shall be unlawful for any person, including the owner, agent, consignee, charterer, master, or commanding officer of any vessel or aircraft, to pay off or discharge any alien crewman, except an alien lawfully admitted for permanent resident, employed on board a vessel or aircraft arriving in the United States without first having obtained the consent of the Attorney General . . . "

jurisdiction and that the wage statutes applied, the Fourth Circuit noted that deduction of advances had occurred in the United States and that the "vessel was in the waters of the United States at the time suit was instituted." The court therefore held that the provisions of both the anti-advance statute and the half wage statute were applicable to the seamen's claims.

Other courts have similarly not considered extraterritorial discharge to bar application of the Seaman's Wage Act:

In *Southern Cross S.S. Co. v. Firipis*, 285 F.2d 651 (4th Cir. 1960), cert. denied 365 U.S. 869, 81 S.Ct. 903, 5 L.Ed.2d 859, a Greek seaman brought suit against a Honduran flag vessel for personal injuries plus wages and penal wages. The court found that the unearned wages accrued prior to the ship having left Germany and the court held:

> "Under circumstances such as these, it has been expressly held that such past wages from a previous voyage, plus double wages, may be the subject of a suit in this country after the ship reaches an American port." (Citations omitted.) 285 F.2d at 659.

In *Arguelles v. U.S. Bulk Carriers*, 408 F.2d 1065 (2d Cir. 1969) at 1069-1070, affirmed 400 U.S. 351, 27 L.Ed.2d 456, 91 S.Ct. 409 (1971), the plaintiff was a Filipino citizen suing for wages and penal wages. He had been discharged in Saigon, South Vietnam. The penalty wage statute was applicable and the plaintiff was not required to utilize the provisions of the collective bargaining agreement prior to seeking his redress before the court.

In *The Sonderborg*, 47 F.2d 723 (4th Cir. 1931), cert. denied 284 U.S. 618, 81 S.Ct. 903, 5 L.Ed.2d 859, the court of appeals applied the wage statutes to seven foreign seamen (from Denmark, Holland, Germany, Sweden and Norway) against a Danish owned and flagged vessel and held that the seafarers were entitled to the benefit of the penal wage statutes. The seven foreign seafarers had been discharged in a foreign port (Halifax, Canada) for refusal to work, placed briefly in jail, and then brought back to the United States. The court clearly held the wage statute equally applicable to foreign and American seamen alike.

In *Escobar v. S.S. Washington Trader*, 640 F.2d 1063 (9th Cir. 1981), the plaintiff had been discharged in Manila and sought recovery for wages and penal wages pursuant to 46 U.S.C. § 596 and § 597. The court, in holding that the wages had been wrongfully withheld and a release wrongfully extracted from Escobar, stated:

> "Moreover, this withholding left Escobar, an illegal alien, stranded in the Philippines without funds. In short, these were the very circumstances that prompted congressional enactment of much of the protective legislation for seamen in Section 596 in particular." (Citations omitted.)

In *Fitzgerald v. Liberian S/T Chryssi P. Goulandris*, 582 F.2d 312 (4th Cir. 1978), the appellate court stated:

> "Plaintiff is correct in asserting that the district court was incorrect if it thought an extraterritorial discharge necessarily precluded the applicability of American wage statutes."

Recovery was denied only because no demand was made under 46 U.S.C. § 597 and no recovery was allowed under 46 U.S.C. § 596 because the seaman's discharge occurred by virtue of his death on the high seas and the court held

that death was not a discharge that would invoke the payment of wages within four (4) days.

In *Morewitz v. Andros Compania Maritima, S.A.*, 614 F.2d 379 (4th Cir. 1980), a Greek seaman was discharged by virtue of his death at sea near the Philippine Islands aboard the vessel Evgeniag, a vessel flying the Greek flag and owned by a Panamanian corporation. The widow brought suit for wrongful death and unpaid wages under 46 U.S.C. §§ 596, 597 and 599. Recovery was denied only because the widow had executed a release for all wages and the court found that her claim was not made in good faith. However, there was absolutely no question that if the claim had been in good faith, the penal statutes would have been applicable.

In *Henry v. S.S. Bermuda Star,* 863 F.2d 1225 (5th Cir. 1989), the plaintiffs were foreign seamen serving on a vessel that frequently called at U.S. ports. While the court's opinion is silent as to the place of discharge, the record of the proceeding reflects that some seamen were discharged in foreign ports, and none of the plaintiffs were in the United States at the time of filing suit.

In *Thomas v. S.S. Santa Mercedes,* 572 F.2d 1331 (9th Cir. 1978), the court did not address the nationality of the plaintiff who was discharged in a foreign country and held that the wage statute was applicable. Four years prior thereto, the Ninth Circuit had applied the penal wage statute to Mr. Escobar, an "illegal alien" who had been discharged in Manila. *Escobar v. S.S. Washington Trader, supra.* Additionally, it has always been clear in the Ninth Circuit that the penal wage statutes apply to Americans discharged in foreign ports as this was the exact holding in *Vincent v. United States,* 272 F. 889 (9th Cir. 1921). Mr. Vincent was discharged in

Manila where the voyage had terminated and the court found that he was entitled to repatriation to the United States along with wages and penalty wages. This also was the exact holding in both the Ninth Circuit and this Court in *American Foreign Steamship Co. v. Matise*, 488 F.2d 469 (9th Cir. 1974), rev. 423 U.S. 150, 46 L.Ed.2d 354, 96 S.Ct. 410 (1975). Both the Ninth Circuit and this Court held the wage statutes applicable to Mr. Matise who had been discharged in South Vietnam; this Court reversing only because it was of the opinion that the airline ticket purchased by the shipowner could be construed as wages and, as such, there was no withholding without sufficient cause.

The ancient concerns of the Congress and the Supreme Court, over the unfair competitive advantage for foreign shipowners, are not mere theoretical musings, nor are they obsolete. In fact, U.S. shipping interests are now suffering from just such a reality. Today U.S. vessels carry less tonnage (both export and import) than anytime in the history of this country, only 3.7% compared to 22.1% 40 years ago and 48.7% 70 years ago.[3] Today there are fewer than 15,000 jobs available for American seamen as opposed to over 168,000 just 45 years ago.[4] In the recent Persian Gulf War, nearly one half of all goods were carried on foreign flag vessels because of the shortage of

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[3] Annual Reports: U.S. Department of Treasury; Commissioner of Navigation and U.S. Department of Commerce.

[4] In the fiscal year 1989, average monthly United States seafaring employment consisted of 14,268 jobs. MARAD Annual Report, 1989, U.S. Department of Transportation, Maritime Administration.

American owned vessels.[5] It would give a foreign shipowner a substantial unfair competitive advantage to hold the United States wage statutes applicable to a United States flag vessel when it discharged a seaman in a foreign port in contravention of the statute and not hold the foreign operator liable to the same extent.

In the case now before this Court, there was not an illegal advance in U.S. waters. Instead, illegal deductions were made in the waters of the United States and illegal wrongful withholding of wages as well as the cheating and fraud alleged in the complaint herein all occurred in the waters of the United States on eight separate occasions.

Also, contrary to the inferences in the trial court's opinion and holding of the Ninth Circuit, the right need not be enforced immediately but is subject to the statute of limitations of claims for wages. The mere fact that Plaintiffs waited until their return to Korea to file suit and arrest the vessel M/V SOUTHERN ASTER in U.S. waters for the wrongful conduct occurred is irrelevant to the cause of action. There simply is no indication that the statute operates as a traffic signal blinking on and off each time the vessel entered United States waters with Plaintiffs aboard – and then turned off when Plaintiffs left the waters of the United States making crossing into international waters like crossing some magical trip line. Plaintiffs did bring suit against the owners while the

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[5] Statement for the Record, Vice Admiral Francis R. Donovan, USN, Commander, Military Sealift Command, House Armed Services Committee, Subcommittee on Seapower and Strategic and Critical Materials.

vessel was in United States waters for a cause of action that previously arose when Plaintiffs were on board the vessel when it was in U.S. waters. Plaintiffs' suit ensured *in rem* jurisdiction of the federal courts and that the forum in which they filed would exercise the mandatory jurisdiction of 46 U.S.C. § 10313. See *Abraham v. Universal Glow*, 681 F.2d 451 (5th Cir. 1982).

The provisions of 46 U.S.C. § 10314, formerly 46 U.S.C. § 599 are to the same effect. This statute prohibits the advance payment of wages. This Court held that this statute only prohibited advance payments in United States territorial waters, and advances paid in foreign countries, that are valid in accordance with the laws of that foreign country, do not trigger the application of § 599. *Sandberg v. McDonald*, 248 U.S. 185, 63 L.Ed. 200, 39 S.Ct. 84 (1918). However, when an illegal advance is made in the territorial waters of the United States, and the seamen subsequently discharged in foreign waters, the provisions of 46 U.S.C. § 599 apply, along with the other provisions of the wage statute, 46 U.S.C. §§ 596 and 597. *Heros v. Cockinos, supra*; Norris, *The Law of Seamen*, § 17:29.

It is clear that subsection (i) is a choice of law provision. The provisions of (i) require an analysis in light of the provisions of 46 U.S.C. § 10303(c) which provides: "Unless otherwise provided, this chapter does not apply to a foreign vessel." Clearly paragraph (i) excepts the provisions of § 10313 from this choice of law provision; and the jurisprudence recognizes the statutory requirement of the application of American law, in particular this American law, to foreign vessels while in harbors of the United States. See *Strathearn S.S. Co. v. Dillon*, 252 U.S.

348, 40 S.Ct. 350, 64 L.Ed. 607 (1920); and *Abraham v. Universal Glow, supra*. A similar provision is found in the anti-advance statute, 46 U.S.C. § 10314, making it applicable to illegal advances made to seamen on foreign vessels in U.S. waters.

The cases of *Lauritzen v. Larsen*, 345 U.S. 571 (1953), and *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306 (1970), provide the choice of law factors to be considered in analyzing the applicability of the Jones Act and American maritime laws, generally, to foreigners under enunciated principles of choice of law analysis. *McCulloch v. Sociedad Nacional Marineros de Honduras*, 372 U.S. 10 (1963), reaffirmed the importance of the law of the flag of the vessel to matters of internal management. *McCulloch* also stands for the proposition that wages and employment conditions are generally governed not by American law, but instead by the law of the flag of the vessel. Paragraph (i) then is a mandate by Congress to assure that the ordinary choice of law provisions applicable in federal maritime cases are not applied to undercut the equalization principles between domestic and foreign shipowners which motivated the statute.[6] Paragraph (i) is a choice of law provision in the statute and it was error for the court to

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[6] Due process concerns dictate some connection with the United States. *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981); and this is met by the request that the wages be withheld while the seaman was on a vessel in a port of the United States. Any construction to the contrary would effectively emasculate the statute as it applies to foreign seamen, leaving their protection to the mere caprice of the port of discharge. Foreign shipowners, aware of such a technicality, would no doubt adjust their practices accordingly.

determine that failure to discharge seamen-Plaintiffs in a port of the United States resulted in the failure of the Plaintiffs to state a claim under the provisions of F.R.C.P., Rule 12(b)(6).[7]

The ability of Congress to statutorily require the application of American law to foreign vessels and entities is a matter which has been well settled. *Strathearn S/S Co. v. Dillon, supra,* and *Patterson v. Bark Eudora,* 190 U.S. 169 (1903). Inasmuch as the statute has been determined both by the Supreme Court and by the express language of Congress to apply to foreign seamen regardless, a choice of law analysis under 46 U.S.C. § 10313 would be both inappropriate and imprudent. The only choice of law or application of foreign law that is required under an action under 46 U.S.C. § 10313 is determining what wages are actually due under the law of the flag of the vessel and its shipping articles in order that American law (46 U.S.C. § 10313) may be properly applied. *Monteiro v. Sociedad Mar. San Nicholas,* 280 F.2d 568 (2d Cir. 1960); *Henry v. S.S. Bermuda Star,* 863 F.2d 1225 (5th Cir. 1989).

Wage cases have always been subject to the admiralty jurisdiction of the court, or on the law side of the court, or in state court pursuant to the savings-to-suitors clause. The trial court was obviously confused by Plaintiffs' position. The trial court opinion provided:

> "Plaintiffs argue that Section 10313 applies to foreign seamen who work or worked aboard

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[7] The only requirement for mandatory jurisdiction under 46 U.S.C. § 10313 is that it be brought in good faith. *Mihalinos v. Liberian S.S. Trikala,* 1972 AMC 726 (C.D.Cal. 1972), and cases cited therein.

> foreign vessels, and who were discharged at any port in the world on the basis of a subsequent entry into the U.S. port. Plaintiffs contend that the vessel need only have been in the U.S. harbor at some point in time with the plaintiffs seamen on board for the penalty wage statute to apply to their claims." (R.E. p. 40)

Plaintiffs submit to this Court that 46 U.S.C. § 10313 is only applicable if the wrongful withholding was made while a foreign seaman was on a vessel in a harbor of the United States, regardless of whether the wrongful withholding was made either under subsection (e) or subsection (f). If the wrongful withholdings were made in a foreign port, then 46 U.S.C. § 10313 would not be applicable just as this Court held advances illegal under United States law that are made in foreign ports are not covered by the wage statute. *Sandberg v. McDonald, supra.* If, however, a wrongful withholding of wages occurs in United States waters while the seaman is on that vessel, and he is subsequently discharged overseas, the plain language of the statute governs and the vessel may be arrested upon a subsequent entry to the United States. This is exactly what happened in the numerous cases cited by Petitioners. It is respectfully submitted that this Honorable Court should reverse the error made herein, and remand this matter with instructions to reinstate Plaintiffs' claims under 46 U.S.C. § 10313.

CONCLUSION

The requirement of the Ninth Circuit that the seamen be discharged in a port of the United States for the application of Seaman's Wage Act is clearly wrong. It is in complete conflict with previous jurisprudence and creates an impossible situation inasmuch as a foreign seaman is prohibited from being discharged in the United States, by virtue of the United States immigration law, 8 U.S.C. 1286. It is respectfully submitted that this Court should reverse the opinion of the Ninth Circuit Court of Appeal and remand the case with instructions that plaintiffs' cause of action be reinstated.

Dated this 5th day of February, 1993.

Respectfully submitted:

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I. Hyeon SU; Seong Gu, et al.; Gim Yeong Ho; Park Min Ho, et al.; Barg Yeong Pal; Seo Jeom Tae; Lee Sil Gwang; Jung Ju Goang; Ji Je Je; O Han Seon; Son Chi Il; Choi Weon Il; Chu Chae Sok; Kig Og Nam; Han Bag Kil; Pyeon Yun Su; Park Sung Ok; Ka Chae Ho; Federated Korean Seamen's Union, et al., Plaintiffs-Appellants,

v.

M/V SOUTHERN ASTER; Southern Aster Navigation, S.A., Defendants-Appellees.

Edwin A. JOSE, Plaintiff,

and

Perfecto C. Lim; Buen B. Esclamado; Crescencio I. Napao; Tomas N. Rosles Je; Hermiles S. Pinoon, Applicants in intervention-Appellants,

v.

M/V FIR GROVE; Delica Shipping, S.A.; Inui Steamship Co., Ltd. Defendants-Appellees.

Nelson R. RABY; Teofanis F. Roz; Apolonio H. Torreliza; Associated Marine Officers & Seaman's Union of the Philippines; S. Galua; Boifacio C. Tabada, et al.; Leo C. Ajero; Teodulo R. Rabie; Marcelo G. Suarez; Miguelito A. Cabales, et al., Plaintiffs-Appellees,

v.

M/V PINE FOREST; Delica Shipping, S.A.; Inui Steamship Co., Ltd., Defendants-Appellants.

Nos. 90-35485, 90-35486, 90-35706, 90-35618, 90-35879, 91-35375.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Aug. 17, 1992.

Decided Oct. 14, 1992.

Richard J. Dodson, Baton Rouge, La., John W. Buehler, Bullivant, Houser, Bailey, Pendergrass & Hoffman, Seattle, Wash., Robert M. Weinberg, Virginia A. Seitz, John West, Bredhoff & Kaiser, Jeremiah H. Collins, Susan D. Carle, Washington, D.C., I. Franklin Hunsaker, for plaintiffs.

Robert I. Sanders, Wood, Tatum Wonacott & Landis, Joe D. Bailey, Kathleen A. McKeon, Portland, Or., Joseph S. Stacy, Le Gros, Buchanan, Paul & Whitehead, William R. Bishin, Seattle, Wash., Kim Jeffries, Portland, Or., for defendants.

Appeal from the United States District Court for the District of Oregon.

Appeal from United States District Court for the Western District of Washington.

Before: WRIGHT, BEEZER, and LEAVY, Circuit Judges.

EUGENE A. WRIGHT, Senior Circuit Judge.

These consolidated cases test the bounds of the Seamen's Wage Act, 46 U.S.C. § 10313 (1988). The Wage Act protects seafarers from the efforts of unscrupulous shipowners to take advantage of their superior economic position to withhold payment of promised wages. Each case requires us to resolve this question: Do the Wage

Act's protections extend to foreign crews discharged from foreign ships in foreign ports? Although Congress likely could have extended the Wage Act this far, we conclude that it did not. The structure, history and, more important, the plain language of the Act all point to this result. Congress must speak clearly to overcome the strong presumption against extraterritorial application of United States law, and this it has not done.

I

Seamen from three Japanese log-carrying ships (the PINE FOREST, FIR GROVE and SOUTHERN ASTER) insist that they were systematically underpaid. The shipowners concede that they paid less than union wages, but say the crew agreed to the lower wages and further agreed to help the shipowners mislead union inspectors intent on uncovering such underpayments.

Underlying the men's claims is an ongoing dispute between shipowners and the International Transport Workers Federation, an umbrella labor organization of affiliated seafarers' unions. The unions seek to maintain worldwide wage rates that far exceed what seafarers from undeveloped countries demand.

The shipowners cannot merely ignore the unions, however, for if the owners fail to pay the union rate, the unions will sometimes interfere with the loading or unloading of the ships. To avoid this, the shipowners must demonstrate compliance with union rules and, in return, the unions award the ships protection in the form of a "Blue Certificate". By showing a Blue Certificate,

ships can forestall union hostility while in port. Shipowners have devised a scheme to obtain Blue Certificates without paying union wages. They keep two sets of books on each ship. One set records the actual wages paid and the other records union scale wages. Seamen memorize the union scale and the ships' masters instruct the crew to lie to union inspectors, telling them that the crew are receiving full union wages.

In the ship's articles, only the union wages are recorded. When the men are paid, they sign two receipts: one records the actual wages and the other shows union wages. This so-called "double-bookkeeping" scheme was used in an effort to deceive the unions on all three ships in this consolidated appeal.

A. The PINE FOREST

The PINE FOREST flew the flag of the Republic of Vanuatu,[1] was operated by a Japanese firm, and was owned by a Panamanian corporation which in turn was beneficially owned by Japanese citizens and companies. It carries logs from the United States to Japan; from Japan to the United States it carries only seawater as ballast.

The PINE FOREST entered service in March 1989 with a crew of nineteen Filipino seafarers. Two others joined the ship later. The men signed 12-month contracts

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[1] Apparently, the Republic of Vanuatu is to shipowners what Delaware is to coporate executives. Vanuatu is well-known for its unintrusive admiralty law. Despite its small size, it has about 400 registered merchant vessels. Paul K. Chapman, *Trouble on Board* 99 (1992).

in the Philippines, were told what they would be paid, and joined the ship in Japan. Each man signed the PINE FOREST's shipping articles, which recited that it abided by the union collective bargaining agreement specifying wages that far exceeded what they had been promised in the Philippines. Each was told, however, that he would in fact receive the lower wages originally promised and that he would be expected to help the shipowners deceive the union.

From March 1989 until the end of January 1990, the PINE FOREST sailed back and forth between Japan and the United States, completing eight trips. At each month end, the crew members received their wages and signed receipts for their actual wages and the higher union wages.

The scheme fell apart while the PINE FOREST was in port in Tacoma. On January 30, 1990, eleven of the crew members filed a complaint demanding full union wages. Their attorneys had the vessel arrested. Shortly thereafter, two other crew members signed the complaint. The union later added the remaining eight seafarers to the complaint, but these eight never signed or verified it.

The thirteen who signed the complaint left the PINE FOREST on February 8, after their replacements arrived. In their seamen's books, which they must take to each new vessel, the master recorded the reason for discharge. "Requested repatriation upon filing wages claim to arrest vessel." The other eight crew members remained aboard the PINE FOREST, completed their year of service, and left the vessel in Japan.

On February 13, the shipowners tendered $267,586 as the amount due the thirteen crew members who had left the ship. The seafarers divided and accepted this payment but later contended it was insufficient. The court set bond at $19,000,000, which the shipowners posted to release the vessel.

At trial, the plaintiffs succeeded on both statutory and maritime tort claims. The court awarded the seafarers $32,657,536, divided as follows:

Thirteen plaintiffs discharged in United States:

1.	Back Wages	23,696
2.	Statutory Penalties	4,191,671
3.	Loss of Future Income	6,800,470
4.	Emotional Distress	1,300,000
5.	Punitive Damages	13,000,000

Eight plaintiffs discharged overseas:

1.	Back Wages	142,236
2.	Statutory Penalties	2,799,463
3.	Loss of Future Income	0
4.	Emotional Distress	400,000
5.	Punitive Damages	4,000,000

The court also awarded attorneys' fees, relying on *Vaughan v. Atkinson*, 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962).

B. The SOUTHERN ASTER

The SOUTHERN ASTER, like the PINE FOREST, was a Japanese-owned log-carrier that transported United States logs to Japan. The crew was Korean rather than Filipino, and were represented by the Korean affiliate of the International Transport Workers Federation.

The crew joined the ship in Japan in March 1988, worked for about a year, then disembarked in Japan. During that year, the SOUTHERN ASTER made eight trips to the United States. It operated the same double-bookkeeping scheme as the PINE FOREST, paying the crew a lower wage than the union rate contained in the ship's articles.

On February 21, 1990, plaintiffs' attorneys had the SOUTHERN ASTER arrested in Coos Bay, Oregon, after filing a complaint for back wages on behalf of the absent crew. The district court set bond, which the shipowners posted to release the vessel.

The district court dismissed the case, granting the shipowners' 12(b)(6) motion on the statutory claims and dismissing the remaining claims on the ground of *forum non conveniens*. The court was not persuaded that the statute applied to foreign seafarers discharged in foreign ports from foreign-owned and flagged vessels. The shipowners agreed to submit to the jurisdiction of a Korean court as a condition of dismissal.

C. The FIR GROVE

The FIR GROVE was a sister ship of the PINE FOREST. It too employed a Filipino crew, flew the Vanuatu flag, and was beneficially owned by the Japanese.

In January 1989, the crew joined the FIR GROVE in Japan. They had been recruited in the Philippines and had agreed to a 12-month term of service. Over the next year, the FIR GROVE completed six trips between Japan and the West Coast, carrying logs to Japan and carrying ballast on the return trip. On these trips, the shipowners maintained the same double-bookkeeping scheme as on the PINE FOREST.

On the seventh trip, twelve crew members had the ship arrested in Coos Bay after filing a complaint for back wages, totalling about $300,000. Two other crew members later joined the complaint. The shipowners paid the back wages under a reservation of rights, and posted a bond to release the FIR GROVE. These fourteen seamen were discharged in Oregon.

Counsel moved for leave to file an amended complaint adding five more crew members who had not verified or signed the complaint and who had not been discharged in Coos Bay. These five stayed on the vessel, completed their year's obligation, and left the ship in Japan.

The court denied the motion, but allowed the five to apply for intervention. They did but the court refused their application, reasoning that their statutory claims were barred because they had been discharged in a foreign port. These five appeal the judgment denying their motion to intervene.

II

The Seamen's Wage Act, 46 U.S.C. § 10313, protects seafarers by ensuring they receive timely payment of

wages. The Wage Act's full wage provision requires prompt payment of wages at the completion of a voyage:

> At the end of a voyage, the master shall pay each seafarer the balance of wages due the seafarer within 24 hours after the cargo has been discharged or within 4 days after the seafarer is discharged, whichever is earlier. . . . When payment is not [timely] made . . . without sufficient cause, the master or owner shall pay to the seafarer 2 days' wages for each day payment is delayed.

46 U.S.C. §§ 10313(f), (g). Necessary to recovery under this provision is a showing that (1) the voyage ended, (2) either the cargo or the seafarer has been discharged, and (3) payment was withheld without sufficient cause.

The Wage Act's half-wage provision also covers partial payments each time a ship stops in port to load or unload cargo:

> After the beginning of the voyage, a seaman is entitled to receive from the master, on demand, one-half of the balance of wages earned and unpaid at each port at which the vessel loads or delivers cargo during the voyage. . . . If a master [fails to pay], the seaman is released from the agreement and is entitled to payment of all wages earned.

46 U.S.C. § 10313(e). The seaman must show that the master refused the man's demand for half-wages. Once the master refuses to pay, full wages become due, and if not paid, the seafarer may be entitled to double wages for each day's delay. *In re Williams*, 139 F.2d 262, 263 (4th Cir.1943).

The Wage Act also has an important jurisdictional provision, extending the Act's protections to seafarers on foreign ships when in a United States harbor:

> This section applies to a seafarer on a foreign vessel when in a harbor of the United States. The courts are available to the seaman for the enforcement of this section.

46 U.S.C. § 10313(i).

A. Underpayment

The seafarers bear the burden of showing that the shipowners paid less than the full amount of wages due. The shipowners half-heartedly contend that the seafarers have no claim because they received the wages promised by the manning agency. The owners suggest that the higher rate shown in the shipping articles does not govern the seafarers' wages, because the men knew they would never be paid that amount.

It is well-established, however, that the shipping articles govern the contract of employment between the seamen and the master, and parol evidence to vary the terms of the articles is permitted only to show that the articles were fraudulently changed by the seafarers. *See* Martin J. Norris, *The Law of Seamen* §§ 6:1, 6:31 (4th ed.1985); *Northwestern S.S. Co. v. Turtle*, 162 F. 256, 258 (9th Cir.1908). In short, once the shipowners executed the shipping articles in furtherance of the double-bookkeeping scheme, they were bound to pay the rate recorded in the articles rather than the lower rate promised before the voyage.

B. Foreign seafarers discharged in United States ports

The Wage Act's jurisdictional provision makes clear that foreign seafarers discharged in an American port may invoke the Act's protections. The issue for these men is not whether they are entitled to seek back wages under the Act, but rather when the Act's protections were triggered and, based on that determination, what if any statutory penalties are due.

The PINE FOREST court awarded the 13 seafarers discharged in the United States over $4,000,000 in statutory penalty wages, finding that the Wage Act's protections were triggered each time it reached port. It reasoned that each leg of the trip was a voyage and the seawater ballast qualified as cargo.

1. Ballast as cargo

To trigger the protections of the Wage Act's full wage provision, the seafarers must show they were not timely paid at the end of their voyage. Timely payment under the statute means payment within 24 hours of discharging the ship's cargo or within four days of the seafarer's discharge, whichever is earlier. The definition of "cargo" under the statute is important for, assuming each trip from Japan to the United States constituted a voyage, if the seawater carried as ballast on those trips qualifies as "cargo," penalties started accruing at the end of each trip.

The Act leaves the term "cargo" undefined. No court has answered the question whether seawater ballast is

cargo under the Act. Precedent from other contexts, common definitions and common sense, however, suggest that seawater ballast is not cargo.

Black's defines *ballast* as "[t]hat which is used for trimming a ship to bring it down to a draft of water proper and safe for sailing." *Black's Law Dictionary* 181 (4th ed. 1951). *Cargo*, on the other hand, is

> [t]he load or lading of a vessel; the goods, merchandise, or whatever is conveyed in a ship or other merchant vessel. While "cargo" is primarily the load of the ship, it may have a varying meaning. The term may be applied in such a sense as to include passengers, as well as freight, but in a technical sense it designates goods only.

Id. at 268 (citations omitted). Non-law dictionaries similarly distinguish the two, defining ballast as "[a]ny heavy material placed in the hold of a ship . . . to enhance stability", and cargo as "[t]he freight carried by a ship. . . . " *See, e.g., American Heritage Dictionary* 102, 204 (1976). Freight is defined as "[g]oods carried by a vessel or vehicle; lading." *Id.* at 525.

Courts have also treated the two as distinct. Many have noted, for example, that ships carrying ballast are "without cargo". *See The Pedro*, 175 U.S. 354, 381, 20 S.Ct., 138, 148, 44 L.Ed. 195 (1899), *rev'd on other grounds, The Buena Ventura v. United States*, 175 U.S. 384, 20 S.Ct. 148, 44 L.Ed 206 (1899); *United States v. Alvarez-Mena*, 765 F.2d 1259, 1261 (5th Cir. 1985); *Pacific Far East Line v. United States*, 394 F.2d 990, 994, 184 Ct.Cl. 169 (1968); *Oliver J. Olsen & Co. v. Luckenbach S.S. Co.*, 279 F.2d 662, 672 (9th Cir.) *cert. denied*, 364 U.S. 881, 81 S.Ct. 171, 5 L.Ed.2d 103

(1960); *Amerada Hess Shipping Corp. v. Argentine Republic*, 638 F.Supp. 73, 73 (S.D.N.Y.1986), *rev'd on other grounds*, 830 F.2d 421 (2d Cir.1987), *rev'd*, 488 U.S. 428, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989); *McGhee v. United States*, 75 F.Supp. 76, 78 (S.D.N.Y.), *modified*, 165 F.2d 287 (2d Cir.1947).

A very few cases have considered ballast as cargo, but in those instances the ballast was something of value. For example, in *Lo Bue v. United States*, 75 F.Supp. 154, 154 (E.D.N.Y.1947), the court referred to a "cargo" of slag ballast. *See also New York Trap Rock Corp. v. Christie Scow Corp.*, 165 F.2d 314, 316 (2d Cir.1948) (unloading of "cargo" of ballast to a second ship for further transport). In none of these cases was the ballast simply worthless seawater.

An earlier version of the full wage provision provided for payment after the discharge of "cargo or ballast", but Congress later deleted the reference to ballast. *Compare* Seaman's Wage Act, ch. 29, § 6, 1 Stat. 133 (1790) *with* Shipping Commissioners' Act of 1872, ch. 322, § 35, 17 Stat. 269 (1872). Congressional intent underlying the revision is at best ambiguous. The reference to ballast may have been viewed as redundant. Yet coincident with the change, Congress added the discharge of the seafarer as a triggering event. In light of this added protection, it may have decided ballast discharge was no longer necessary as a triggering event.

We conclude that worthless seawater carried as ballast does not constitute cargo as envisioned by the Wage Act. Cargo is freight or goods that have some value. Even if each leg of the trip could be considered a separate

voyage, the Act's protections were not triggered when the log-carriers dumped their load of seawater on arrival in an American port.

2. Each trip as a voyage

Like "cargo", "voyage" is not defined in the Wage Act. The PINE FOREST court defined each leg of the trip as a voyage. We conclude that such a definition conflicts with the structure and language of the Act.

The Act contains both full and half wage provisions. The latter is triggered at every port in which the ship takes on or discharges cargo. We doubt Congress could have intended the broad definition of a voyage adopted by the PINE FOREST court. Defining a voyage as each leg of a trip renders the half wage provision meaningless, for under that definition the full wage provision could be invoked any time the half wage provision could apply.

The seamen insist, though, that courts have read the "end of voyage" requirement out of the statute. They rely on several recent decisions in which courts have held that the full wage provision applied though the ship never left port. For example, in *Griffin v. Oceanic Contractors*, 458 U.S. 564, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982), Griffin suffered an injury shortly after joining the vessel and before it sailed. Although the Court did not expressly consider whether he met the voyage requirement, it granted him relief under the full wage provision. *Id.* at 577, 102 S.Ct. at 3253.

In *Chung, Yong Il v. Overseas Navigation Co.*, 774 F.2d 1043 (11th Cir.1985), *cert. denied*, 475 U.S. 1147, 106 S.Ct.

1802, 90 L.Ed.2d 346 (1986), the court explicitly considered the issue. Like *Griffin*, the *Chung* crew were discharged after spending time on a ship that never left port. The court held that the voyage requirement did not preclude these men from invoking the full wage provision. *Id.* at 1051.

As we read *Griffin* and *Chung*, however, neither ignores the voyage requirement. Instead, they define voyage to further the Wage Act's protective purpose. A seaman's voyage ends when his commitment to work aboard the ship is terminated, either by completion of his contract or by premature discharge. *See, e.g., Mavromatis v. United Greek Shipowners Corp.*, 179 F.2d 310, 318-19 (1st Cir.1949); *The Cubadist*, 252 F. 658, 660, 662-63 (S.D. Ala. 1918), *aff'd*, 256 F. 203 (5th Cir.), *cert. denied*, 249 U.S. 618, 39 S.Ct. 392, 63 L.Ed. 804 (1919). Under this definition the *Griffin* and *Chung* seafarers had completed their voyages when they were discharged, even though the ships never left port.

Applying this definition, the PINE FOREST seafarers were not entitled to full wages each time the ship stopped in the United States or Japan. Rather, full wages became due four days after they were discharged following the filing of the complaint. Although they had not completed their contractual obligations, their voyages terminated when they were discharged.

C. Foreign seafarers discharged in foreign ports.

We start with the well-established principle that, absent a clearly expressed intent to the contrary, United

States statutes apply only within the territorial jurisdiction of the United States. *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285, 69 S.Ct. 575, 577, 93 L.Ed. 680 (1949). "We assume that Congress legislates against the backdrop of that presumption against extraterritoriality." *EEOC v. Arabian Am. Oil Co.*, ___U.S. ___, ___, 111 S.Ct. 1227, 1230, 113 L.Ed.2d 274 (1991). Because we find no clearly expressed intent to contradict this presumption, logic dictates that the full wage provision should not apply to foreign seafarers discharged from foreign ships in foreign ports.

This result is consistent with the plain language of the Wage Act, which is the clearer evidence of the Act's jurisdictional limits. The Act is part of Chapter 103 of Title 46, which notes that "[u]nless otherwise provided, this chapter does not apply to a foreign vessel." 46 U.S.C. § 10301(c). Against this background, the Act makes an exception for foreign vessels in American ports: "This section applies to a seafarer on a foreign vessel when in a harbor of the United States." *Id.* § 10313(i).

Nevertheless, the seafarers contend that crew members discharged overseas may recover under the Wage Act. They suggest that limiting the Act to foreign ships in United States ports thwarts one of the Act's underlying purposes. In their view, the jurisdiction limiting clause cannot really mean what it says. Alternatively, they insist that if some conduct facilitating the later withholding of wages occurred in an American port, the jurisdiction requirement is met.

They find some support in the case law. We have never decided the issue, and there is directly conflicting

authority among the districts in this circuit. In *Galon v. M/V Hira II*, 1990 A.M.C. 342, 1989 WL 211484 (W.D.Wash.1989), the court ruled without further analysis that "the statute does not require discharge in a United States port." *Id.* at 343. Shortly thereafter, the court in *Mateo v. M/S Kiso*, No. C-902357-DLJ ___ F.Supp. ___ (N.D.Cal.1991), held to the contrary, finding discharge in a United States port a prerequisite to applying the statute.

Confusion on this issue is not limited to this circuit's district courts. Some other courts have been willing to extend the Act to foreigners discharged in foreign ports. In *Ventiadis v. C.J. Thibodeaux & Co.*, 295 F.Supp. 135 (S.D.Tex.1968), the court held that "to limit [the Act] only to instances in which the seafarer is discharged in an American port would be to unreasonably restrict its effect." *Id.* at 138; *see also Fitzgerald v. Liberian S/T Chryssi P. Goulandris*, 582 F.2d 312, 314 (4th Cir. 1978) (extraterritorial discharge does not preclude application of the Act).

Other courts have followed the view expressed in dictum by Judge Friendly in *Monteiro v. Sociedad Maritima San Nicolas, S.A.*, 280 F.2d 568 (2d Cir.), *cert. denied*, 364 U.S. 915, 81 S.Ct. 272, 5 L.Ed.2d 228 (1960). Judge Friendly reasoned that "[t]he natural reading is rather that a seafarer on a foreign vessel obtains his right once the specified facts occur while the vessel is in a harbor of the United States. . . . " *Id.* at 574; *see also Cubeiro v. Sun Seaway Enters.*, 539 F.Supp. 1175, 1177 (S.D.N.Y.1982) ("[I]t is now well settled that a foreign seafarer, sailing on board a foreign-flag vessel, may file a [wage] claim in a United States court . . . if he was discharged from the vessel in a United States port. . . . However, it is equally

clear that for the statute to apply, the discharge must have taken place in a United States port."); *Barcelona v. Sea Victory Maritime*, 1992 A.M.C. 369, 372, 1991 WL 323803 (E.D.La.1991) (discharge must be in United States port); *Angad v. M/V Fareast Trader*, 1989 A.M.C. 2721, 2728, 1989 WL 201605 (S.D.Tex.1989) (wages can accrue anywhere, but withholding of payment must be in United States port).

The seafarers argue that if this court adopts Judge Friendly's view, it will confound one of the Act's underlying purposes. Congress was primarily concerned with protecting seafarers when it enacted these provisions. *Griffin*, 458 U.S. at 572, 102 S.Ct. at 3250. But Congress also sought to enhance the competitiveness of American shippers. It worried that subjecting only United States flag vessels to the wage provisions would put United States shipping at a competitive disadvantage. To level the playing field, it extended the Act to foreign vessels. 50 Cong. Rec. 55748-49 (Oct. 22, 1913).

Had Congress wanted to include all foreign vessels, however, it could have done so expressly. The language of the Wage Act is clear. It applies only to foreign vessels in United States ports. To let one of the Act's underlying purposes trump the statute's plain language would violate a basic tenet of statutory construction. *Cf. Commissioner v. Brown*, 380 U.S. 563, 571, 85 S.Ct. 1162, 1166, 14 L.Ed.2d 75 (1965) (purpose can override plain language only in an exceptional case).

But the seafarers also contend that the final withholding of wages was part of an ongoing scheme by the

shipowners, during the entire course of a voyage. Conduct integral to the scheme occurred while the ships were in United States harbors, say the seafarers, thus satisfying the Act's jurisdictional requirement.

Under this theory, a single pause at a United States port during the course of a three-year voyage would trigger the protections of the Wage Act. Such an expansive reading contradicts the Act's plain language. Nor is such a broad reading necessary to further the Act's purpose of equalizing shipping costs between foreign and United States vessels. Each time a foreign vessel takes on or discharges cargo in a United States port, the foreign crew may invoke the Act's half wage provision. If the master refuses to pay, the men may invoke the full wage provision. Foreign vessels cannot avoid the Act simply by ensuring that they never complete a voyage in a United States port.

It is also unclear what wrongful conduct the shipowners engaged in while in a United States port. The Act imposes harsh penalties but only for specific, well-defined conduct: the wrongful withholding of wages. Until that occurs, the Act's protections are unavailable. For those seamen discharged overseas, that prohibited conduct did not occur in a United States port.

D. Demand for half wages

The seafarers insist that even if they cannot obtain relief under the full wage provision, they can invoke section 10313(e), the half wage provision. This section allows crew members to claim half their accrued wages

when they are in a United States port loading or unloading cargo. The difficult issue of jurisdiction over foreign crews in foreign ports does not arise here, because each of the three ships loaded cargo in United States ports.

The key to the seamen's claim is whether they made an effective demand for half wages, as the Act requires. They insist they did, by executing wage receipts. They would have us believe that each time they signed a false receipt acknowledging payment of union scale wages, they were in fact demanding payment at that rate.

But for a demand to be effective, it must plainly and unequivocally request payment. "The demand must be plainly made so that the master will know exactly what is demanded of him, and since if he refuses the payment of the half wages, all of the wages then become due, it becomes obvious that clarity in the making of the demand is essential." Martin J. Norris, *The Law of Seamen* § 17:33 (4th ed. 1985); *see also In re Ivertsen*, 237 F. 498, 501 (N.D.Cal.1916).

Signing wage receipts as part of the double-bookkeeping scheme falls far short of an effective demand, for it fails to notify the ships' masters of the crews' claims. It would more easily have been interpreted as acceptance of the double-bookkeeping scheme rather than a demand for higher wages.

The seamen virtually admit this, saying that had they made their demands explicit, they would have been terminated. To allow such a hidden demand to satisfy the demand requirement would effectively eliminate it.

E. Summary of statutory claims

1. The PINE FOREST

The PINE FOREST crew discharged in the United States are entitled to back pay at the full union scale described in the ship's articles. The shipowners paid this amount when they tendered $267,586. The court erred in assessing penalties based on the mistaken conclusion that each trip was a voyage and that ballast was cargo.

The PINE FOREST crew discharged overseas are not covered by the Wage Act's full wage provision and did not make an effective demand for half wages. The court erred in awarding them back wages and statutory penalties.

2. The SOUTHERN ASTER

All the seamen were discharged overseas. The court did not err when it dismissed their statutory claims, nor did it abuse its discretion when it dismissed their tort claims on the grounds of *forum non conveniens*.

3. The FIR GROVE

The five FIR GROVE seamen seeking intervention were all discharged overseas. The court properly denied intervention.

III

Besides awarding back wages and statutory penalties, the PINE FOREST court also awarded substantial

tort damages. The court granted the crew $8.5 million in compensatory damages and punitive damages totalling $17 million. Yet neither the court's findings nor the evidence underlying them supports any of the tort theories on which the award is based.

A. Fraud

As a court sitting in admiralty, we look to the common law in considering maritime torts. *Guidry v. Durkin*, 834 F.2d 1465, 1470 (9th Cir.1987). We turn then to Washington's definition of fraud and its nine elements: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) an intent that it be acted on by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) reliance on its truth; (8) the right to rely thereon; and (9) consequent and proximate injury. *Markov v. ABC Transfer & Storage Co.*, 76 Wash.2d 388, 457 P.2d 535, 539 (1969). Each element is essential; if any is missing, the entire claim fails. *Id.*

The seafarers suggest that there were several misrepresentations that support a finding of fraud: (1) the shipowners planned to lie to union inspectors about the wage rates; (2) the manning agency told the seafarers they would receive a wage close to the union rate; and (3) the shipowners deliberately misled the seafarers about their rights to receive the union wage.

The shipowners admit an intent to deceive the union. This amounts to an intended misrepresentation to the seamen, say the crew, because of their relationship with the union. The union represented them. Under well-

established principles of agency law, an attempt to deceive an agent ordinarily constitutes an attempt to deceive the principal. Restatement (Second) of Agency § 315 (1957). Yet if the principal knows the true facts, the attempted deception may not be imputed to the principal. These seamen not only knew the facts but had agreed to help the shipowners to carry out the deception by lying to union inspectors. To call this a misrepresentation to the seafarers would stand agency law on its head.

The seamen argue, however, that even though they were a party to the misrepresentation, it nevertheless deprived them of one of the essential benefits of union representation. By negotiating a deal behind the back of the union, the owners undercut the union's role as the seamen's representative. Maybe so, but it is not fraud on the seafarers.

The men also insist that the manning agency misrepresented that they would be paid a wage that approximated the union wage. The court's express findings refute this. It found that the shipping articles "contained a significantly higher pay scale than the oral representations made to plaintiffs by [the manning agency]." Ample testimony by the seafarers supports this finding.

Finally, the seafarers say that the shipowners' failure to tell them that they were entitled to higher wages was a misrepresentation. The court's findings do not support this theory, nor are we willing to hold that this was a representation, let alone a misrepresentation.

The failure to show a misrepresentation is alone enough to undermine the seamen's claim of fraud, but they also failed to show either reliance or the shipowners'

intent to induce reliance on any alleged misrepresentations. Accordingly, we conclude that there was no fraud.

B. Outrage

The claims of intentional infliction of emotional distress are based both on the notations made in the seamen's books and their participation in the double-bookkeeping scheme.

To prove intentional infliction of emotional distress, the seafarers must show that: (1) the conduct complained of was extreme and outrageous; (2) the distress was intentionally or recklessly inflicted; and (3) they suffered actual severe emotional distress. *Rice v. Janovich,* 109 Wash.2d 48, 742 P.2d 1230, 1238 (1987); Restatement (Second) of Torts § 46 cmt. d (1965) (hereafter, "Restatement").

> To be outrageous conduct, it must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.

Restatement § 46 cmt. d; *see also Contreras v. Crown Zellerbach,* 88 Wash.2d 735, 565 P.2d 1173 (1977) (adopting cmt. d). It is not enough that the conduct was maliciously, tortiously or criminally intended.

Several factors bear on the determination whether the alleged conduct meets this standard:

(1) the position occupied by the defendants;

> (2) whether plaintiffs were particularly susceptible to emotional distress, and if defendant knew this fact;
>
> (3) whether defendants' conduct may have been privileged under the circumstances;
>
> (4) whether the degree of emotional distress caused by a party was severe as opposed to mere annoyance, inconvenience, or normal embarrassment; and
>
> (5) whether the actor was aware that there was a high probability that his or her conduct would cause severe emotional distress and proceeded in a conscious disregard of it.

Spurrell v. Bloch, 40 Wash.App. 854, 701 P.2d 529, 535, *review denied*, 104 Wash.2d 1014 (1985).

1. The discharge notations

The PINE FOREST's master entered the reason for discharge in each of the thirteen seafarer's books: "Requested repatriation upon filing wages claim to arrest vessel." This alone does not constitute outrageous conduct.

It is, rather, an accurate reflection of events. These thirteen men had requested repatriation after filing wage claims to arrest the vessel. Accurate statements about an employee's performance generally do not constitute outrage. *Dicomes v. State*, 113 Wash.2d 612, 782 P.2d 1002, 1013 (1989).

Furthermore, "[t]he actor is never liable . . . where he had done no more than insist upon his legal rights in a permissible way, even though he is well aware that such

insistence is certain to cause emotional distress." Restatement § 46 cmt. g. The master did no more than record an accurate statement of the reason for discharge and the conduct does not rise to the level of outrageous conduct.

2. The double-bookkeeping scheme

The seamen claim distress from their participation in the double-bookkeeping scheme. Yet they failed to show either that the conduct was outrageous or that they suffered any severe emotional distress.

Outrageous conduct far exceeds the bounds of decency. As the Restatement explains, it takes more than "mere insults, indignities, threats, annoyances, or petty oppressions, or other trivialities". Restatement § 46 cmt. d; *see also Grimsby v. Samson*, 85 Wash.2d 52, 530 P.2d 291, 295 (1975). Enlisting the men's help in deceiving the union may be objectionable, but it was not "beyond all possible bounds of decency and utterly intolerable in a civilized society." Restatement § 46 cmt. d.

Nor did these plaintiffs show that they suffered severe or extreme emotional distress, with objectively manifested symptoms. *Hansley v. Giard*, 87 Wash.2d 424, 553 P.2d 1096, 1103 (1976). More than the stress of everyday life must be shown. *Id.; see also Spurrell*, 701 P.2d at 535-36 (one sleepless night, tears, loss of appetite and anxiety is not severe emotional distress); *Lawson v. Boeing Co.*, 58 Wash.App. 261, 792 P.2d 545, 550-51 (1990) (loss of appetite, libido and energy, sleeplessness and increased headaches did not satisfy severe emotional distress element), *review denied*, 116 Wash.2d 1021, 811 P.2d 219

(1991). The court did not find any objectively manifested symptoms and the seafarers failed to allege them.

C. Blacklisting

The seamen say that by recording the reason for discharge in their seamen's books, the shipowners violated the prohibition against blacklisting.

Few courts have considered blacklisting claims. The Restatement explains blacklisting as

> intentionally and improperly interfer[ing] with another's prospective contractual relation- . . . whether the interference consists of
>
> (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or
>
> (b) preventing the other from acquiring or continuing the prospective relation.

Restatement § 766B. If the statement is true, however, it is not improper:

> One who intentionally causes a third person . . . not to enter into a prospective contractual relation with another does not interfere improperly . . . by giving the third person
>
> (a) truthful information, or
>
> (b) honest advice within the scope of a request for the advice.

Id. § 772; *see also id.* cmts. a, b.

The seamen do not dispute that the entries were accurate and true and their claim of blacklisting fails.

IV

Ordinarily, the prevailing party in a maritime action is not entitled to attorneys' fees. Under the courts' equitable powers, however, a court may award fees when the defendant has forced the plaintiff to "go to court to get what was plainly owed him". *Vaughan v. Atkinson*, 369 U.S. 527, 531, 82 S.Ct. 997, 999, 8 L.Ed.2d 88 (1962).

The PINE FORST court awarded $564,737 in attorneys' fees, apportioned thus: $410,043 for the seamen discharged in the United States and $154,693 for those discharged overseas. We affirm that portion of the judgment awarding fees to the men discharged here and reverse the award to those discharged overseas.

The shipowners contend that they should not be required to pay any such fees, for they tendered the amount due shortly after the men left the ship. Yet they also pressed counterclaims for back wages paid, for the costs of what they thought was an excessive bond and for the costs of defending the action in the United States. We agree with the district court that the men discharged here had no choice but to seek the help of the court to retain the wages to which they were plainly entitled.

V

The judgment of dismissal in the SOUTHERN ASTER case is affirmed, as is the judgment denying intervention to the FIR GROVE seafarers. The parties will bear their own costs on appeal in both cases.

The PINE FOREST judgment is reversed, except for that portion of the judgment granting attorneys' fees to the men discharged in the United States. The parties will bear their own costs.

I Hyeon SU, et al, Plaintiffs,

v.

M/V SOUTHERN ASTER, In Rem, and Southern Aster Navigation, S.A., Defendants.

Civ. No. 90-165-MA.

United States District Court, D. Oregon.

Feb. 28, 1990.

On Reconsideration May 10, 1990.

Richard I. Dodson, Thomas E. Richard, Baton Rouge, La., John Buehler, Bullivant, Houser, Bailey, Pendergrass & Hoffman, Portland, Or., for plaintiffs.

Paul N. Wonacott, Wood, Tatum, Mosser, Brooke & Landis, Portland, Or., for defendants.

OPINION

MARSH, District Judge.

Plaintiffs are twenty former crew members of the M/V SOUTHERN ASTER and The Federated Korean's Seamen's Union (FKSU). All plaintiffs are citizens of Korea. Plaintiffs seek to recover back wages and penalties pursuant to 46 U.S.C. § 10313 as well as compensatory and punitive damages for alleged fraudulent labor practices. On February 21, 1990, plaintiffs filed a complaint with this court and the Southern Aster was arrested at the Port of Coos Bay by United States Marshals. On February 23, 1990, an expedited hearing was held at which time I set the amount of the bond to be posted in order to secure

release of the vessel at $500,000. The following constitutes a written formalization of my oral rulings and conclusions of law.

This action originally came before me on defendants' motion to dismiss plaintiffs' wage claims for lack of jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1) and their motion to vacate the arrest of the M/V Southern Aster. At the first expedited hearing held on February 22, 1990, I denied defendants' motion to dismiss for lack of subject matter jurisdiction. I found that the cases relied upon by defendants may have supported a motion to dismiss for failure to state a claim under Fed.R.Civ.P. 12(b)(6), but they did not support defendants' contention that this court was without subject matter jurisdiction to hear the wage claims of foreign seamen under general maritime law. *See Cuevas v. Reading and Bates Corp.*, 770 F.2d 1371, 1380 (5th Cir. 1985)[1] (court discusses applicability of former section 46 U.S.C. § 10313 to foreign seamen's claims, but does not address threshold jurisdiction issue); and *Monteiro v. Sociedad Maritima San Nicolas, S.A.*, 280 F.2d 568, 574 (2nd Cir.), *cert. denied*, 364 U.S. 915, 81 S.Ct. 272, 5 L.Ed.2d 228 (1960) (same).

At the end of this hearing I directed the parties to address the issue of setting a bond to release the vessel pursuant to Admiralty Rule E(5)(a). The parties stipulated that the value of the vessel was $10 million and thus the maximum amount allowable under Rule E(5). Thereafter, plaintiffs submitted a memoranda in which they

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[1] The holding in *Cuevas* as it relates to the doctrine of forum non conveniens was expressly overruled in *In re Air Crash Disaster Near New Orleans, L.A.*, 821 F.2d 1147, 1163 (5th Cir. 1987).

argued that they were entitled to a bond for the full value of the vessel as their claims for back pay, penalty wages, and compensatory and punitive damages exceeded $10 million.[2] Defendants indicated a willingness to agree to a bond of $500,000 to cover claims for back wages under general maritime law, but argued that plaintiffs had failed to state a claim for penalty wages under section 10313(g). I indicated to the parties that I would not consider plaintiffs' claims for compensatory or punitive damages based upon my earlier ruling on the identical issue in *Jose, et al. v. M/V Fir Grove,* Civ. No. 90-6028-MA (February 7, 1990) (oral ruling denying inclusion of plaintiffs' fraud damages within bond amount under Rule E(5)(a)).

Rule E(5)(a) provides that the amount of the bond set shall be up to two times plaintiffs' claim "fairly stated." Section 10313(i) provides that the section will apply only to "seamen on a foreign vessel when in a harbor of the United States." Thus, the issue presented before me in this case was whether foreign seamen, discharged from their foreign vessel in a foreign port in May of 1988, could bring a claim for penalty wages under section 10313 against the owner of a foreign vessel.

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[2] Plaintiffs claim the following in damages: 1) approximately $250,000 in back wages; 2) approximately $13 million in penalty wages pursuant to 46 U.S.C. § 10313(g) through 2/28/90 or $28.8 million through 12/91; 3) $3.3 million in compensatory damages; and 4) $3.3 million in punitive damages.

On February 23, 1990, I held an additional hearing to set the amount of the bond. After reviewing the memoranda and cases cited by both parties and hearing additional arguments regarding plaintiffs' basis for claiming penalty wages under section 10313(g), I determined that plaintiffs had failed to state a claim for penalty wages. In reaching this conclusion, I found that each of the cases relied upon by plaintiffs was distinguishable in several material respects. First, in *Henry v. S/S Bermuda Star,* 863 F.2d 1225 (5th Cir. 1989), the Court addressed the issue of the dual application of Panamanian and United States Labor Law to the plaintiff-seamen's wage claims. The Court held that a repatriation deduction made in accordance with Panamanian law would not be considered illegal under the U.S. wage penalty provision (section 10313) although not expressly excluded under the statute. At footnote 70 of that opinion, the court expressly limited the application of its holding to the facts at hand and declined to hold that section 10313 was directly applicable to foreign seamen's wage claims. Similarly, in *Thomas v. SS Santa Mercedes,* 572 F.2d 1331 (9th Cir. 1978) the Court addressed the issue of when the plaintiff was "discharged" for the purposes of determining the amount of the penalty claim, but did not address the threshold issue presented here regarding the nationality of the seamen or of the vessel owner and the plaintiff's entitlement to state a claim under section 10313.

Finally, I found that while Judge Dwyer's decision in *Galon, et al. v. M/V HIRA II, et al.,* Civ No. 89-888, 1989 WL 211484 (order filed Oct. 27, 1989) and the decision in *Ventiadis v. C.J. Thibadeaux & Company,* 295 F.Supp. 135

(S.D. Tex. 1968) lend some support to plaintiffs' argument, both decisions are distinguishable and unpersuasive. In *Ventiadis,* the trial judge gave great weight to the fact that the beneficial owner of the vessel was an American citizen and thus, the suit was between two foreign nationals "in name only." In *HIRA II,* Judge Dwyer concluded, without discussion, that the penalty wage claims of foreign seamen could be included within the release bond based upon *Henry* and *Thomas,* discussed above. Because I find that the holdings in *Henry* and *Thomas* are not dispositive of the issue presented here, I do not agree with Judge Dwyer's conclusion and decline to adopt it.

Based on the foregoing, I concluded that the bond should be set at $500,000, or roughly two times the plaintiffs' claim for back wages "fairly stated." I found that doubling was necessary to account for costs and time spent in litigation. Based upon defendants' submission of a letter of credit and plaintiffs' stipulation as to the adequacy of the security which will bear interest at a rate of 6%, I signed an order releasing the vessel immediately following the hearing.

ON RECONSIDERATION

Plaintiffs are former crew members of the M/V SOUTHERN ASTER and the Federated Korean's Seamen's Union (FKSU). Plaintiffs seek to recover back wages and penalties pursuant to 46 U.S.C. § 10313 as well as compensatory and punitive damages for alleged fraudulent labor practices. On February 23, 1990, I granted defendant's motion to dismiss plaintiffs' penalty wage claims upon argument and without opinion due to the

expedited nature of the hearing. On April 23, 1990, I granted plaintiffs' motion for reconsideration of my prior order because of the time constraints and plaintiffs' submission of additional authorities. In addition, defendant moves to dismiss this action based upon the doctrine of *forum non conveniens* and plaintiff moves to consolidate this case with *Munoz v. M/V SOUTHERN ASTER*, Civ. No. 90-122-MA. For the reasons that follow, my prior ruling dismissing plaintiffs' claims for penalty wages pursuant to Fed.R.Civ. P. 12(b)(6) is affirmed, defendant's motion to dismiss on the basis of *forum non conveniens* is granted and plaintiffs' motion to consolidate is denied as moot.

BACKGROUND

On February 21, 1990 the Southern Aster was arrested at the Port of Coos Bay by United States Marshals. On February 22 and 23, 1990, I conducted an expedited hearing to set the amount of bond necessary to release the vessel. In addition, I denied defendants' motion for dismiss for lack of jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1), but granted its motion to the extent it sought to dismiss plaintiffs' claims for penalty wages under § 10313.

At the hearing on February 23, 1990, and in a follow-up opinion issue on February 28, 1990, I found that plaintiffs claims for penalty wages were not "fairly stated" and thus could not be included within the amount of the bond. In addition, I determined that plaintiffs had failed to state a claim for penalty wages under § 10313. Based upon the cases submitted by both parties, I found that there was no legal support for plaintiffs' contention

that foreign seamen, discharged from a foreign vessel, in a foreign port were entitled to the protection of the U.S. Shipping Act.

DISCUSSION

1. *Reconsideration of the Applicability of Penalty Wages*

The United States Shipping Act, 46 U.S.C. § 10313, provides in relevant part:

* * *

> (f) At the end of a voyage, the master shall pay each seaman the balance of wages due the seaman within 24 hours after the cargo has been discharged or within 4 days after the seaman is discharged, whichever is earlier. When a seaman is discharged and final payment of wages is delayed for the period permitted by this subsection, the seaman is entitled at the time of discharge to one-third of the wages due the seaman.
>
> (g) When payment is not made as provided under subsection (f) of this section without sufficient cause, the master or owner shall pay to the seaman 2 days' wages for each day payment is delayed.
>
> * * *
>
> (i) This section applies to a seaman on a foreign vessel when in a harbor of the United States. The courts are available to the seaman for the enforcement of this section.

Plaintiffs are all Korean citizens. The Southern Aster is owned by a Panamanian company, flies the Panamanian flag and its beneficial owner is Japanese. Plaintiffs

were discharged from the Southern Aster in Japan in May of 1988.

Subsection (f) of the statute provides that the penalty wage provision is only triggered upon "discharge of cargo or seaman." All of the cases cited by plaintiff in which a foreign seaman has been allowed to recover under U.S. wage provisions involve actual *discharge* at a United States port. *See, Patterson v. Bark Eudora,* 190 U.S. 169, 23 S.Ct. 821, 47 L.Ed. 1002 (1903) (anti-advance wage statute applies to foreign seamen where the wrongful acts on the territory and within the jurisdiction of the U.S.); *The Sonderborg,* 47 F.2d 723 (4th Cir. 1931) (wage statute applies where foreign seamen who signed on in New Orleans were discharged in Norfolk, Virginia); *Caribbean Federation Lines v. Dahl,* 315 F.2d 370 (5th Cir.) *cert. denied* 375 U.S. 831, 84 S.Ct. 76, 11 L.Ed.2d 62 (1963) (statute held applicable to foreign seamen aboard a foreign owned vessel where discharged in Mobile, Alabama); *Mihalinos v. Liberian S.S. Trikala,* 342 F.Supp. 1237 (S.D.Cal.1972) (Greek seaman discharged in Alaska, court did not reach issue of applicability of wage statute, finding instead that claim not made in good faith).

In *Strathearn v. Dillon,* 252 U.S. 348, 40 S.Ct. 350, 64 L.Ed. 607 (1920), a British seaman on board a British vessel invoked what is now 46 U.S.C. § 10313(e) which allows a seaman to receive one-half of the balance of wages earned and unpaid upon demand while the ship was in Pensacola, Florida. Justice Brandeis held that the provision conferring the right to demand half-wages applies to foreign seamen on foreign vessels, "when they enter our ports." The Court reasoned that subjection to U.S. law in order to override valid foreign contractual

provisions to the contrary, is a "condition of the right to such foreign vessels to enter and use ports of the U.S." *Id.* at 356, 40 S.Ct. at 352. *See also Southern Cross S.S. Co. v. Firipis,* 285 F.2d 651 (4th Cir. 1060) *cert. denied* 365 U.S. 869, 81 S.Ct. 903, 5 L.Ed.2d 859 (1961) (Greek seaman may claim past wages and penalties in this country after the ship reaches an American port).

Similarly, the legislative history relied upon by plaintiffs wherein they cite Senator Fletcher's debate of 1915 (regarding the predecessor statute, 46 U.S.C. §§ 596, 597), although comprehensive in its intent to equalize costs between foreign and domestic merchant vessels, similarly recognizes a jurisdictional limit to vessels in ports of the United States. Congressional Record-Senate, October 22, 1915 at 5748.

In addition, plaintiffs contend that *Hellenic Lines, Ltd. v. Rhoditis,* 398 U.S. 306, 90 S.Ct. 1731, 26 L.Ed.2d 252 (1970) demonstrates that plaintiffs need only have substantial contacts with the U.S. in order to invoke U.S. laws. However, *Rhoditis* involved a claim brought pursuant to the Jones Act and the Court's analysis was limited to finding whether or not plaintiffs had established sufficient minimum contacts in order to avoid a dismissal based upon the doctrine of *forum non conveniens.* Thus, the Court did not address the applicability of the Shipping Act nor its specific provision requiring discharge as a prerequisite to a claim for penalty wages. § 10313(f). *See also Mihalinos,* 342 F.Supp. 1237.

In my prior ruling, I also found that each of the cases originally relied upon by plaintiffs was distinguishable in

several material respects. Plaintiffs offer no new arguments regarding their prior cited cases, but specifically re-urge me to adopt Judge Dwyer's conclusion in *Galon, et al. v. M/V HIRA II, et al.*, Civ. No. 89-888, 1989 WL 211484 (order filed Oct. 27, 1989). In *HIRA II*, Judge Dwyer concluded, without discussion, that the penalty wage claims of foreign seamen could be included within the release bond. However Judge Dwyer did not address the jurisdictional issues raised here and based his conclusion on *Henry v. S/S Bermuda Star*, 863 F.2d 1225 (5th Cir.1989) and *Thomas v. SS Santa Mercedes*, 572 F.2d 1331 (9th Cir.1978), both of which I found were distinguishable as they failed to address the threshold jurisdictional inquiry.

In *Escobar v. S.S. Washington Trader*, 640 F.2d 1063 (9th Cir.1981), the plaintiff, whose nationality is uncertain from the text of the opinion, was discharged in Manila and sought recovery under the U.S. penal wage statute.[1] The court did not discuss jurisdiction, and its holding was limited to the issues of the timeliness of plaintiff's claim and whether or not defendant was entitled to credit for funds expended by the owner for a plane ticket back to the United States. However, the court did note that plaintiff was discharged from an American Merchant vessel.

In *Heros v. Cockinos*, 177 F.2d 570 (4th Cir.1949), the court held that the anti-advance statute applied to foreign

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[1] Plaintiffs refer to Escobar as a "Philippine national." However, the court indicates that plaintiff was an "illegal alien" while in the Philippines. Defendant contends that Escobar was an American.

seamen discharged in foreign ports where the illegal advances and deductions occurred in the United States. Following that opinion, the Fourth Circuit refused to reach the issue of the applicability of the U.S. wage statute to a foreign seaman, on a foreign vessel when in a foreign country. *Fitzgerald v. Liberian S/T Chryssi P. Goulandris,* 582 F.2d 312, 314 (4th Cir.1978). However, the court distinguished *Heros* on the basis that the illegal acts in *Heros* actually occurred within the United States. *Id.* 582 F.2d at 313. The court went on to hold that the U.S. wage statute was inapplicable because plaintiff's estate failed to present a good faith claim for an "end of voyage" payment since plaintiff had only served 23 days out of his one year contract before his death. The Court reasoned that death did not constitute "discharge" which would invoke the end of voyage payment. *See also Morewitz v. Andros Compania Maritima, S.A.,* 614 F.2d 379 (4th Cir.1980) (court did not address jurisdiction, but held claim for end of voyage payment not made in good faith because death does not constitute a discharge).

Finally, several cases relied upon by plaintiffs hold that U.S. wage statutes are applicable to U.S. seamen discharged in foreign ports, *Matise v. American Foreign Steamship Co.,* 488 F.2d 469 (9th Cir.1974), *rev'd* 423 U.S. 150, 96 S.Ct. 410, 46 L.Ed.2d 354 (1975); *Vincent et al. v. United States,* 272 F. 889 (9th Cir.1921), or foreign seamen serving on an American vessel, *see Arguelles v. U.S. Bulk Carriers,* 408 F.2d 1065 (4th Cir.1969) *aff'd,* 400 U.S. 351, 91 S.Ct. 409, 27 L.Ed.2d 456 (1971). I find all of these cases distinguishable from the facts presented in this case.

Plaintiffs argue that § 10313 applies to foreign seamen, who work or worked aboard foreign vessels and

who are discharged at any port in the world on the basis of a subsequent entry of the vessel into a U.S. port. Plaintiffs contend that the vessel need only have been in a U.S. harbor at some point in time with the plaintiffs seamen on board for the penalty wage statute to apply to their claims. Otherwise, plaintiffs argue, foreign shipowners could effectively circumvent United States laws by consistently discharging their foreign crews in foreign ports, even though all or most of their shipments were to and from the United States. However the statute relied upon by plaintiffs as the basis of their claim for penalty wages clearly requires "discharge" of either cargo or crew as a prerequisite to recovery and no court has yet to find such an extension appropriate. Thus, the statute creates a "gap" wherein foreign vessel owners may avoid the penalty wage provisions so long as they leave a domestic port without being haled into court and discharge their seamen in a foreign port.

Although plaintiffs' argument is well-taken, and I can envision how such a tactic could potentially be abused by foreign vessel owners, the statute clearly requires discharge in a U.S. port as a jurisdictional prerequisite. Further, no court has extended the coverage of the U.S. wage provisions to a situation analogous to that presented here. Based on the foregoing, I find that plaintiffs have failed to state claims for penalty wages as they are not entitled to recover under the U.S. Shipping Act's wage laws, 46 U.S.C. § 10313(g). Accordingly, my prior ruling dismissing their claim for penalty wages is affirmed.

2. *Motion to Dismiss for Forum Non Conveniens*

In *Lauritzen v. Larsen*, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953) the Supreme Court set forth the test for determining whether or not a U.S. court should exercise jurisdiction under the Jones Act for injuries sustained by a foreign seaman while serving aboard a foreign vessel, where his only contact with the U.S. forum was the signing of his shipping articles while he was in this country temporarily. In determining that the Jones Act was inapplicable because of insufficient contacts with the United States, the Court considered the following factors: (1) the place of the wrongful act; (2) the law of the flag; (3) the allegiance of the domicile of the injured; (4) the allegiance of the defendant shipowner; (5) the place of the contract; (6) the inaccessibility of the foreign forum; and (7) the law of the forum. However, the *Lauritzen* test is not exhaustive. In subsequent cases the Supreme Court has also considered defendant's base of operations, and whether defendant has had "substantial and continuing" business contacts with the forum. *Hellenic Line Ltd. v. Rhoditis*, 398 U.S. 306, 310, 90 S.Ct. 1731, 1734, 26 L.Ed.2d 252 (1970).[2]

The central focus of a *forum non conveniens* inquiry is convenience, and the factors must be applied flexibly and comprehensively, with no one decisive factor. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 250, 102 S.Ct. 252, 263, 70

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[2] In *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 79 S.Ct. 468, 3 L.Ed.2d 368 (1959), the Supreme Court affirmed the test set forth in *Lauritzen* and applied it to an action brought by a foreign seaman under the general maritime law of this country.

L.Ed.2d 419 (1981).[3] In addition, the court must determine whether an alternative forum exists. *Id.* at 253, n. 22, 102 S.Ct. at 265, n. 22. Dismissal is appropriate where trial in plaintiff's chosen forum "imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice." *Id, citing Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947).

Plaintiffs first argue that jurisdiction is mandatory given the application of the U.S. wage statute, 46 U.S.C. § 10313. Second, plaintiff argues that the balance of factors favors a U.S. forum given the application of general maritime law to their wage and fraud claims, defendant's extensive transactions with Oregon, and their contention that all of their major witnesses are English speaking and reside in the United States. However, plaintiff only identifies one U.S. witness, an American inspector for International Transport Worker's Federation (ITF), an international union affiliated with FKSU.

In carefully weighing all of the factors present in this case, I find that dismissal on the basis of *forum non*

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[3] Although no one factor may be determinative, factors of greater importance have been identified as the domicile of the plaintiff, the base of operations and place of substantial contacts, the accessibility of the foreign forum, and the law of the flag. Thomas Schoenbaum, Admiralty and Maritime Law 190-191 (West Pub.1987) *citing Sigalas v. Lido Maritime, Inc.,* 776 F.2d 1512 (11th Cir.1985); *Villar v. Crowley Maritime Corp.,* 782 F.2d 1478 (9th Cir.1986); *Dracos v. Hellenic Line, Ltd.,* 762 F.2d 348 (4th Cir.1985); *Pereira v. Utah Transport, Inc.,* 764 F.2d 686 (9th Cir.1985) *cert. dismissed,* 475 U.S. 1040, 106 S.Ct. 1253, 89 L.Ed.2d 362 (1986).

conveniens is appropriate on three grounds. First, either Korean, Japanese, or Panamanian law will apply to plaintiffs' wage claims. Plaintiffs were recruited in Korea and the Collective Agreement, which specifically provides for the application of Korean law, was executed in Pusan, Korea. The voyages of the SOUTHERN ASTER all began and terminated in Japan. Plaintiffs joined the ship in Japan and were discharged in Japan. The law of the flag is Panamanian.

Second, the case would be more conveniently tried in another forum given that the contracts and documentation are in Korea and Japan, all plaintiffs reside in Korea, and defendant's base of operations is in Japan. Given the probable application of Korean contract and labor law and the interests of Korea in this dispute, trial in Korea would be more appropriate in its court as well.

Finally, an alternative forum exists in Korea. In its Reply, defendant agrees that as a condition to dismissal of this action, defendant would submit to the jurisdiction of a Korean court. Defendant alleges, and plaintiff does not dispute that Korea is viable alternative forum.

Although it appears from the pleadings that defendants have had substantial contacts with the U.S., the balance of factors tips in favor of dismissal. The parties, alleged wrongful acts, source of proof and majority of witnesses all appear to be in either Japan or Korea. The collective agreement itself calls for the application of Korean law to this dispute, and both parties agree that Korea is an available alternative forum. United States jurisdiction is not mandatory given my previous finding that the U.S. Shipping Act wage statutes do not apply to

plaintiffs' claims.[4] The interests of the United States in resolution of this matter is minimal, while the interests of Korea and Japan appear substantial given the need for consistent application of contract and labor law principles to this dispute. Defendants base of operations is in Japan and Korea, all plaintiffs reside in Korea, and all documentary evidence is in Japan and Korea.

Based on the foregoing, defendant's motion to dismiss on the basis of *forum non conveniens* is granted in light of the substantial burden that would be imposed upon defendant and the court and the interests of Korea and resolution of this dispute. Both public and private factors indicate that dismissal is both appropriate and fair.

3. *Plaintiffs' Motion to Consolidate*

Plaintiffs move to consolidate this action with another action currently pending before this court, *Munoz, et al. v. Southern Aster,* Civ. No. 90-122-MA. At the hearing held on April 23, 1990, plaintiffs agreed that if defendant's motion to dismiss was granted, that their motion to consolidate would be moot. Accordingly, in light of my ruling dismissing this action on the basis of

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[4] During oral argument, plaintiffs offered an additional basis for mandatory jurisdiction under 46 U.S.C. § 10313(e) which provides that seamen may recover one-half of the balance of wages earned, on demand, at each port at which the vessel is loaded. However plaintiff offered no evidence, nor am I able to find any indication in the record, that a demand for one-half wages was ever made at any port.

forum non conveniens, plaintiffs' motion to consolidate is denied as moot.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

I. HYEON SU; JO SEONG GU, et al.; GIM YEONG HO; PARK MIN HO, et al.; BARG YEONG PAL; SEO JEOM TAE; LEE SIL GWANG; JUNG JU GOANG; JI JE JE; O HAN SEON; SON CHI IL; CHOI WEON IL; CHU CHAE SOK; KIG OG NAM; HAN BAG KIL; PYEON YUN SU; PARK SUNG OK; KA CHAE HO; FEDERATED KOREAN SEAMEN'S UNION, et al., Plaintiffs-Appellants, v. M/V SOUTHERN ASTER; SOUTHERN ASTER NAVIGATION, S.A., Defendants-Appellees.	Nos. 90-35485 90-35486 D.C. No. CV-90-165-MA
NELSON R. RABY; TEOFANIS F. ROZ; APOLONIO H. TORRELIZA; ASSOCIATED MARINE OFFICERS & SEAMAN'S UNION OF THE PHILIPPINES; S. GALUA; BOIFACIO C. TABADA, et al; LEO C. AJERO; TEODULO R. RABIE; MARCELO G. SUAREZ; MIGUELITO A. CABALES, et al., Plaintiffs-Appellees, v. M/V PINE FOREST; DELICA SHIPPING, S.A.; INUI STEAMSHIP CO., LTD., Defendants-Appellants.	Nos. 90-35618 90-35879 91-35375 D.C. No. CV-90-5038-JET ORDER (Filed Dec. 9, 1992)

Before: WRIGHT, BEEZER, and LEAVY, Circuit Judges.

The panel has voted to deny the petition for rehearing, and Judges Beezer and Leavy have voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for a rehearing en banc is REJECTED.

---

46 U.S.C. § 10313. Wages

(a) A seaman's entitlement to wages and provisions begins when the seaman begins work or when specified in the agreement required by section 10302 of this title for the seaman to begin work or be present on board, whichever is earlier.

(b) Wages are not dependent on the earning of freight by the vessel. When the loss or wreck of the vessel ends the service of a seaman before the end of the period contemplated in the agreement, the seaman is entitled to wages for the period of time actually served. The seaman shall be deemed a destitute seaman under section 11104 of this title. This subsection applies to a fishing or whaling vessel but not a yacht.

(c) When a seaman who has signed an agreement is discharged improperly before the beginning of the voyage or before one month's wages are earned, without the seaman's consent and without the seaman's fault justifying discharge, the seaman is entitled to receive from the master or owner, in addition to wages earned, one month's wages as compensation.

(d) A seaman is not entitled to wages for a period during which the seaman –

> **(1)** unlawfully failed to work when required, after the time fixed by the agreement for the seaman to begin work; or

(2) lawfully was imprisoned for an offense unless a court hearing the case otherwise directs.

(e) After the beginning of the voyage, a seaman is entitled to receive from the master, on demand, one-half of the balance of wages earned and unpaid at each port at which the vessel loads or delivers cargo during the voyage. A demand may not be made before the expiration of 5 days from the beginning of the voyage, not more than once in 5 days, and not more than once in the same port on the same entry. If a master does not comply with this subsection, the seaman is released from the agreement and is entitled to payment of all wages earned. Notwithstanding a release signed by a seaman under section 10312 of this title, a court having jurisdiction may set aside, for good cause shown, the release and take action that justice requires. This subsection does not apply to a fishing or whaling vessel or a yacht.

(f) At the end of a voyage, the master shall pay each seaman the balance of wages due the seaman within 24 hours after the cargo has been discharged or within 4 days after the seaman is discharged, whichever is earlier. When a seaman is discharged and final payment of wages is delayed for the period permitted by this subsection, the seaman is entitled at the time of discharge to one-third of the wages due the seaman.

(g) When payment is not made as provided under subsection (f) of this section without sufficient cause, the master or owner shall pay to the seaman 2 days wages for each day payment is delayed.

(h) Subsections (f) and (g) of this section do not apply to a fishing or whaling vessel or a yacht.

(i) This section applies to a seaman on a foreign vessel when in a harbor of the United States. The courts are available to the seaman for the enforcement of this section.

(Pub.L. 98-89, Aug. 26, 1983, 97 Stat. 566; Pub.L. 99-640, § 10(b)(4), Nov. 10, 1986, 100 Stat. 3550.)

No. 92-1319

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

I. HYEON SU, *et al.*,

Petitioners,

v.

M/V SOUTHERN ASTER, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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April 9, 1993

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QUESTIONS PRESENTED: RESPONDENT'S COUNTERSTATEMENT

1. Whether individuals in whose name a union sued but who were not parties in the trial court may appeal the trial court's judgment.

2. Whether a seaman on a foreign vessel can recover under 46 U.S.C. §10313 if the events ordinarily creating a right under that section do not occur in a United States harbor.

3. Whether the trial court misapplied FRCP 12(b)(6) and whether the court of appeals erred in not reversing its judgment on that ground.

Pursuant to Sup. Ct. R. 29.1, notice is given that:

There are no parent companies, subsidiaries or affiliates of Southern Aster Navigation, S.A.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

Respondents M/V Southern Aster and Southern Aster Navigation, S.A., respectfully request that this Court deny certiorari to review the judgment entered in this case by the United States Court of Appeals for the Ninth Circuit on October 14, 1992, and reported at 978 F.2d 462.

COUNTERSTATEMENT OF THE CASE

Respondents do not accept Petitioners' Statement of the Case, and will provide relevant counterstatement in the Reasons for Denying the Writ. Failure to contradict a specific allegation does not signify acceptance of the allegation, but merely a desire to spare the Court unnecessary work.

The Cross-Petition for Writ of Certiorari, No. 92-1521, and the Brief in Opposition to Certiorari in No. 92-1316, *Raby v. M/V Pine Forest*, provide important background for this action. This brief assumes familiarity with the Statement of the Case in those pleadings.

REASONS FOR DENYING THE WRIT

I.

PETITIONERS ARE NOT PROPERLY BEFORE THE COURT AS THEY WERE NOT PARTIES BELOW.

The eight named "petitioners" are Korean citizens who were not parties below, and are not now properly before the court. The action was brought by the Federated Korean Seamen's Union, which added the men's names to

the complaint without their knowledge or consent. The Union does not join in the petition, and does not petition on its own.

The sole basis for the Union's authority to use the petitioners' names appears in Paragraph 15 of the Complaint:

> Plaintiff FKSU is a labor union licensed in the Republic of Korea and is authorized to bring suit in the name of seafarers on board the M/V Southern Aster. The crew members on board the M/V Southern Aster granted this authority to FKSU by their membership in said union, and the Defendants acknowledged and agreed in their Collective Bargaining Agreement that the FKSU has the right to represent said crew members and bring legal action in their names on their behalf.

In subscribing, the Union's counsel, Mr. Dodson, asserted:

> That I have been appointed and retained, and I am presently serving as legal counsel in the United States of America for the Federated Korean Seamen's Union and in behalf of said union and its members I have been requested to initiate the instant proceeding. Further, I have been provided information by my client . . . and . . . all of the allegations . . . are in accordance with the information provided by my client . . . .

A. 18-19. No petitioner ever joined in the action during the time it was pending in the district court.

Before arresting the Southern Aster, Mr. Dodson had begun two other cases against foreign ships doing business on the West Coast of the United States. In late January, 1990, he sued and arrested, first, the Fir Grove, in Oregon, then the Pine Forest, in Tacoma, Washington. Fourteen of the Fir Grove seamen joined in the suit and

left the ship in Oregon. Five stayed aboard and declined to join in the suit, whereupon Mr. Dodson sued in their names on behalf of AMOSUP, the Philippine union. Thirteen of the Pine Forest seamen sued their vessel. The remainder declined to sign the complaint, stayed with the ship, and were discharged in Japan at the end of their contracts. AMOSUP later added their names to the complaint without their consent, and prosecuted the action purportedly on their behalf even after they signed voluntary dismissals. *Su v. M/V Southern Aster*, 978 F.2d 462 (9th Cir. 1992) at 466; Petitioners' Appendix 4-8.

When the Southern Aster, a Panamanian vessel owned by Japanese interests, arrived on the Oregon coast in the third week of February, 1990, Mr. Dodson arrested it on behalf of seamen who were on it at the time. Security was quickly posted. When the ship was released he arrested it again, asserting he acted with authority from the FKSU to sue for a former crew, the last member of which had left the ship in Japan in June of 1989. Petitioners were members of that crew.[1]

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[1] The Complaint included as Exhibit "A" a portion of the shipping articles of the Southern Aster. Pages 2 and 3 of this exhibit contain information about the individual seamen, including their names, ages, addresses and other personal information in the first, or left-hand segment, information about the "Port of Enrollment" in the center segment, and information about the "Port of Discharge" in the right-hand segment. In the right-hand segment, the center column records the place of discharge and the date of discharge. The latest discharge date is June 24, 1989.

A. The Action Was Brought by The Federation of Korean Seafarers Union, Which Claimed to Act On Behalf of the Seamen. The Seamen Never Consented, Never Verified The Complaint, And Never Made Any Form of Appearance In The Case.

The complaint was not verified by any of the seamen. Verification is required by Supplemental Admiralty Rule C(2), (3). The complaint does not allege that the seamen assigned their claims to the Union. It bases the Union's authority to sue solely on the fact that the men were union members. (App. 6a, ¶ 15.) The union alleged no claims of its own.

A week after the arrest Mr. Dodson told the district court that the seamen were scattered throughout Korea and had not seen or read the complaint. (App. 17a-18a) He asked for a two-week stay to obtain verifications. *Id.* Either he did not pursue this matter or he was unsuccessful. No verifications were ever submitted. No individual plaintiff ever appeared in the court below.

In the Ninth Circuit, when he was challenged about the right of the petitioners to appeal, Mr. Dodson asserted that he had individual retainers from them, but he did not say when he got them – whether before or after judgment – and he did not produce them.

It seems clear that Mr. Dodson attempts to appear for eight seamen who were never parties to the underlying action, but are attempting after the multimillion dollar judgment in the Pine Forest case to become part of the action at the appellate level.

B. The Union Did Not Have Standing To Assert Individual Wage Claims On Behalf of The Seamen.

The FKSU, a foreign union, had no standing to bring the individual crew members' wage claims, and the district court had no subject matter jurisdiction. *Charley's Taxi Corp. v. SIDA of Hawaii, Inc.*, 810 F.2d 869, 874 (9th Cir. 1987). Even an American union would not have standing to bring the action under 46 U.S.C. §10313. In *Warth v. Seldin*, 422 U.S. 490, 515-516 (1975), this Court held that an association has no standing to claim money damages for injuries to its members because such claims are neither common to the entire membership nor shared by all in equal degree. See also *United Steelworkers v. University of Alabama*, 599 F.2d 56, 59 (5th Cir. 1979); *United States ex rel. United Brotherhood v. Woerfel Corp.*, 545 F.2d 1148 (8th Cir. 1976); *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351 (1971). The courts below did not reach this question, but if every other issue had been resolved in Mr. Dodson's favor, this one would still prevent recovery. It makes his present pursuit academic.

II.

THE "QUESTION PRESENTED" BY PETITIONERS IS NOT RAISED BY THE DECISION OF THE COURT OF APPEALS. IT IS NOT A QUESTION ON WHICH THE PARTIES DISAGREE, AND IT IS NOT AN IMPORTANT QUESTION.

The Court of Appeals held that petitioners could not recover under subsection (f) of §10313 because they had been discharged in a foreign port, and that they could not recover under subsection (e) because they had not made a demand for half wages while they were in a port of the United States. 978 F.2d at 470, 472. These were the

sole dispositive holdings affecting the claims that petitioners ask this Court to review.

These holdings raise essentially two questions:

> (1) Whether a seaman on a foreign vessel can have a cause of action for wages and penalties under § 10313-(f) and (i) when his employment terminated not in a U.S. harbor, but in a foreign harbor;
>
> (2) Whether the signing of a wage receipt in a U.S. harbor by a seaman on a foreign vessel should be treated as a demand for half wages.[2]

Id. at 472.

This statement of the questions presented differs significantly from the "question presented" in the petition:

> [Whether] an extraterritorial discharge of a seaman prohibits the application of the Seaman's Wage Act when the wrongful withholding of wages occurred while the seaman was on a foreign vessel in a harbor of the United States.

Petition at i. This question would have been presented if the court of appeals had held that there had been a "wrongful withholding of wages" in a U.S. harbor, but that nevertheless the petitioners had no cause of action because they had been discharged on a foreign harbor. But the court of appeals did not hold this. Expressly with respect to § 10313(f) and implicitly with respect to § 10313(e), it held that a "wrongful withholding of

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[2] We believe the court of appeals was far too generous to petitioners in framing the subsection (e) issue. There was no allegation in the complaint that any of the alleged withholding occurred in a U.S. harbor. In addition, the complaint stated that the request or demand was for full wages, not half wages, which we contend does not satisfy the requirements of § 10313(e).

wages" in a U.S. harbor under either section is enough to state a claim, but that there had been no wrongful withholding of wages while the vessel was in a U.S. harbor. 978 F.2d at 472.

All remaining parties in this action and the Ninth Circuit agree that the wrongful withholding of wages under (e) or (f) must occur in a U.S. harbor for a seaman on a foreign vessel to have a cause of action.[3] Petitioners' acceptance of this proposition appears, *inter alia*, at p. 17 of the petition. The parties and the Ninth Circuit also agree that an extraterritorial discharge does not necessarily preclude a claim when conduct violating the Act occurs in a U.S. harbor. In short, petitioners have framed a question with an answer all agree on. But if this Court were to grant certiorari and answer that question in petitioners' favor, it would not resolve the issues raised by the Ninth Circuit's decision. That is why the "question presented" by petitioners is of no importance.

Petitioners' purported "question," however, does create confusion. More importantly, it obscures and overstates the importance of the different question that in fact is being presented to this Court. The confusion is created because the question speaks not of any particular subsection of §10313 – each of which has its own requirements – but simply of "the Seaman's Wage Act," by which it apparently means both subsections (e) and (f) of the Act, but not the other subsections.[4]

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[3] The union in this case, FKSU, and the union in the *Fir Grove* and *Pine Forest* cases, AMOSUP, did not agree that the wrongful withholding must take place in a U.S. harbor. Much of the Ninth Circuit's opinion on the question of whether a seaman on a foreign vessel must be discharged in a U.S. harbor responds to the unions' arguments. But since petitioners have not taken the same position, this Court need not deal with the issue.

[4] This is a common usage, but by no means the only one. "The Seaman's Wage Act" often means all of the subsections of

[footnote continued]

The significance of an extraterritorial discharge under the Act, however, varies radically depending upon the subsection under discussion. Under subsection (e) whether a seaman on a foreign vessel is discharged in the United States or in a foreign nation ordinarily is irrelevant. The critical question is whether a demand for half wages was made in a U.S. harbor and was rejected by the vessel. If it was, then the seaman has a cause of action irrespective of where he is discharged. The court of appeals recognized this implicitly at p. 472, col. 1, of its opinion. But it found that there had been no demand in a U.S. harbor. Thus, that court did not disqualify petitioners' subsection (e) claim because of an extraterritorial discharge, but because there was no wrongful withholding of wages within a U.S. harbor.

The analysis under subsection (f), however, was very different. Under that subsection, termination of the seaman's employment was held to be an element of the cause of action; that is, there is no cause of action until the seaman's employment comes to an end. In addition, the court held that for a seaman on a foreign vessel to recover under subsection (f), subsection (i) requires that the termination of his employment occur in a U.S. harbor – because under that subsection all of the elements of a §10313 claim must occur in a U.S. harbor. 978 F.2d at 471-72. Thus, under subsections (f) and (i), unlike subsection (e), termination of the seaman's employment (i.e., the seaman's discharge) in a U.S. harbor is not only relevant, it is critical to state a cause of action. In petitioners' words, there can be no "wrongful withholding of wages" under §10313(f) for a "seaman

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§10313, and sometimes also §10314 and 10315, which also directly regulate a seaman's wages.

on a foreign vessel in a harbor of the United States" if the seaman is not discharged in that harbor.[5]

Petitioners admit that they were discharged in a foreign harbor. Thus they apparently must admit that there was no wrongful withholding of their wages *under subsection (f)* in a harbor of the United States, unless they argue that subsection (f) does not require that the seaman's employment terminate before he has a cause of action. The petitioners in the related *Raby* case, No. 92-1316, did make that argument. But the petitioners in this case, although represented by the same counsel, do not. For purposes of this appeal, then, they have accepted the following propositions: (1) for a seaman on a foreign vessel to have a cause of action under any subsection of §10313, there must be a wrongful withholding of his wages in a U.S. harbor; (2) there cannot be a wrongful withholding under subsection (f) unless the seaman has been discharged; and (3) the seamen here were not discharged in a U.S. harbor. Having accepted these premises, petitioners logically preclude themselves from arguing that the Ninth Circuit erred insofar as it denied their claim under subsection (f).

Thus the first of the possible holdings of the Ninth Circuit that petitioners could challenge here – that a seaman on a foreign vessel has no cause of action under §10313(f) if he is discharged in a foreign port – has not in fact been challenged and thus presents this Court with no question on the subject.

The argument of the petition for certiorari, therefore, can only be construed to challenge the Ninth Circuit's

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[5]The seaman's discharge also figures in another of the elements of the §10313(f) cause of action – the requirement that payment be made within one day of cargo discharge or four days of the seaman's discharge.

second holding – i.e., that there was no wrongful withholding of wages in a U.S. harbor under subsection (e) because there was no demand for half wages in a U.S. harbor. A critical analysis of the petition, we believe, will confirm that this is the only question that it actually addresses, despite much diversionary verbiage.

That holding is also challenged by the petitioners in *Raby*, on the ground that a wage receipt which the petitioners there signed should be treated as a demand. But that is *not* the argument that petitioners make here. Here petitioners are taking the position that this appeal is from a judgment of dismissal under FRCP 12(b)(6) and that the facts in the complaint must be taken as true for purposes of such a motion. Thus, they argue, since the complaint says that there was a demand, the trial court and the Ninth Circuit should have assumed there was a demand. The complaint does not say that the demand petitioners had in mind was a wage receipt, so the court cannot use the wage receipt's failure to qualify as a "demand" as a basis for holding that there was no demand.

The issue, then, that petitioners raise here is not, as in *Raby*, whether a wage receipt can be a demand. Unlike that question, it is not a question about the meaning of a statute. Petitioners' complaint is that the union should have been allowed to prove that a demand had been made, and that the trial court dismissed the complaint without allowing them to do so. The issue petitioners raise here, in other words, is whether the court of appeals erred when it did not reverse the trial court for allegedly misapplying FRCP 12(b)(6).

The question in fact presented by this petition is whether the trial court made an elementary procedural

error and the court of appeals erred by not catching it. Passing the entirely appropriate reasons why the trial court dismissed the action without letting the union go to trial on the "demand" issue,[6] the question presented simply is not of sufficient importance to justify this Court's grant of certiorari.

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[6]The complaint does not plead a demand for half wages, but rather for full wages; and it does not plead that any of the alleged demands occurred in a U.S. harbor. It sets out the language of subsections (f), (g), and (i), but not the language of (e). It expressly states that the subsections it sets out are the ones that are "pertinent" to its claim. It alleges facts which track the requirements of (f), but not of (e). Most importantly, in his written response to the motion to dismiss Mr. Dodson did not claim that he was pleading a §10313(e) claim. In fact, even on reconsideration, his written submission did not make the argument. It was first raised on oral argument after the trial court granted a motion to reconsider the order dismissing the claim. At that point, the trial court noted the absence of any evidence of a demand, which might have been inappropriate initially, but not when the theory was raised so late.

Of critical importance was the fact that in this oral argument Mr. Dodson admitted that the demands he was referring to were wage receipts. The trial court arguably had the discretion at that point to view this preposterous argument as a desperate attempt to fend off dismissal. In any event, this court will know that if it were to reverse the order dismissing for failure to state a claim, the claim will ultimately be dismissed on summary judgment when it becomes clear that the only demand referred to was a wage receipt.

It is true that there is one reference to subsection (e) in the complaint, but that is an obvious error because in the con . of the pleading it could only have been subsection (f) that was me nt.

III.

PETITIONERS' CLAIM THAT THERE IS A CONFLICT BETWEEN THE NINTH CIRCUIT AND THE FOURTH CIRCUIT IS BASED ON THE MISPERCEPTION OF THE NINTH CIRCUIT'S HOLDING IN THIS CASE DISCUSSED ABOVE AND ON A MISREADING OF THE *FITZGERALD* CASE.

Petitioners claim that the "Ninth Circuit intends that the wage statute should not apply to foreign seamen discharged in a foreign port, even when the wrongful withholding of wages occurs in a United States port." This position, they say, is in conflict with other circuits. It is conceded that there would be a conflict if the Ninth Circuit took this position, but as we have shown above, the Ninth Circuit does not take this position.

There is an apparent conflict between the Ninth Circuit's holding that under subsection (f) a seaman has no cause of action unless discharged in a U.S. harbor and dictum in *Fitzgerald v. Liberian S/T Chryssi P. Goulandris*, 582 F.2d 312 (4th Cir. 1978), where the court says that American wage statutes are not necessarily inapplicable where there is an extraterritorial discharge. Dictum, however, cannot create a conflict, since in the absence of a holding there is no law on the subject, merely a judge's opinion.

In addition, the court there was uncritically lumping together a number of different provisions – particularly the anti-advance statute, §10314, and §10313(f). The court's only support for its position was a case dealing with §10314, *Heros v. Cockinos*, 177 F.2d 570 (4th Cir. 1949). But that statute does not require a discharge in a U.S. harbor for the same reason that subsection (e) does not. Termination of a seaman's employment (i.e., his discharge) is not one of the elements of the cause of

action. The cause of action consists of making an advance of wages before they have been earned. If it is made to a seaman on a foreign vessel it must be made while the vessel is in U.S. waters. 46 U.S.C. §10314(c). When or where the discharge occurs is irrelevant. Accordingly, there is no conflict between the Ninth Circuit and the circuits which have held that a claim under the advance statute is not defeated by an extraterritorial discharge.

The Petition for Certiorari also contends that eight other cases conflict with the Ninth Circuit's holding here. These cases are: *Southern Cross S.S. Co. v. Firipis*, 285 F.2d 651 (4th Cir. 1960), *cert. den.*, 365 U.S. 869 (1961); *Arguelles v. U.S. Bulk Carriers*, 408 F.2d 1065 (2d Cir. 1969), *aff.*, 400 U.S. 351 (1971); *The Sonderborg*, 47 F.2d 723 (4th Cir. 1981), *cert. den.*, 284 U.S. 618 (1931); *Escobar v. S.S. Washington Trader*, 640 F.2d 1063 (9th Cir. 1981); *Morewitz v. Andros Compania Maritima, S.A.*, 614 F.2d 379 (4th Cir. 1980); *Henry v. S.S. Bermuda Star*, 863 F.2d 1225 (5th Cir. 1989); *Thomas v. S.S. Santa Mercedes*, 572 F.2d 1331 (9th Cir. 1978); and *American Foreign Steamship Co. v. Matise*, 488 F.2d 469 (9th Cir. 1974), *rev.*, 423 U.S. 150 (1975).

These cases do not conflict with the Ninth Circuit's ruling. Three (*Southern Cross*, *The Sonderborg* and *Henry*) involve the discharge of a seaman in a U.S. harbor. In the present case no seaman was discharged in a U.S. harbor. Four of the cases (*Arguelles*, *Escobar*, *Thomas* and *American Foreign Steamship Co. v. Matise*) involve American ships; it is conceded that seamen on American ships need not be discharged in a U.S. harbor to recover under §10313. The eighth case, *Morewitz*, was dismissed because the wage claim used to establish jurisdiction was not asserted in good faith. The seaman died, and as *Fitzgerald* had held, the death was not a "discharge."

IV.

THE NINTH CIRCUIT'S HOLDINGS IN THIS CASE ARE CLEARLY CORRECT AND DO NOT REQUIRE FURTHER REVIEW.

Although the petition does not actually challenge the holdings of the Ninth Circuit, we discuss them to avoid any implication that they are in any way flawed.[7] The Ninth Circuit's holding that a seaman on a foreign vessel has no cause of action under subsections (f) and (i) follows irresistibly, as the court's opinion clearly shows, from the presumption against extraterritorial application of American law, the structure of Chapter 103 of Title 46 and the plain meaning of subsection (i) itself.

Section 10301 of Title 46 provides:

> (c) Unless otherwise provided, this chapter does not apply to a foreign vessel.

Section 10313(e), (f), and (i) provide in pertinent part:

> (e) After the beginning of the voyage, a seaman is entitled to receive from the master, on demand, one-half of the balance of wages earned and unpaid at each port at which the vessel loads or delivers cargo during the voyage . . . .
>
> (f) At the end of a voyage, the master shall pay each seaman the balance of wages due the seaman within 24 hours after the cargo has been discharged or within 4 days after the seaman is discharged, whichever is earlier . . . .
>
> * * * *

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[7] For the discussion of the holding that a wage receipt is not a demand, we incorporate by reference the argument in the Brief in Opposition to the Petition for Writ of Certiorari in No. 92-1316, *Raby v. M/V Pine Forest.*

> (i) This section applies to a seaman on a foreign vessel when in a harbor of the United States. The courts are available to the seaman for the enforcement of this section.

The plaintiffs' argument throughout these proceedings has been that the presumption against extraterritoriality and the plain language of 46 U.S.C. §10301 and §10313-(i) should be disregarded in favor of a purpose derived from the legislative history of the 1915 revisions of the Act. This, of course, is impermissible. *Griffin v. Oceanic Contractors*, 458 U.S. 564 (1982); *Rodriguez v. United States*, 480 U.S. 522 (1987). Legislative history may only be consulted in a case like this to determine if there is a clearly expressed intention of Congress that contradicts the result yielded by faithfully following the statute's language. *E.g., Griffin, supra.* A broad general purpose does not establish such a specific intent and no plaintiff in any of these cases has cited evidence clearly establishing that Congress would have had the Seaman's Wage Act apply to a failure to pay wages when seamen on a foreign vessel were discharged in a foreign port.

Accordingly, the legislative history of the 1915 version of the Act should not have been considered further. *Rodriquez, supra,* at 526:

> Where, as here, the language of a provision . . . is sufficiently clear in its context and not at odds with the legislative history, . . . "[there is no occasion] to examine the additional considerations of 'policy' . . . that may have influenced the lawmakers in their formulation of the statute."

The Court should not infer, however, that the legislative history supports the plaintiffs' position. That history shows on the contrary that there were very specific reasons why the predecessor of subsection (i), 46 U.S.C.

§597, limited the rights it granted seamen on foreign vessels to the time when they were in U.S. harbors.

In 1915 Congress enacted broad revisions of seamen's law. Among the more important changes were revisions to section 4530, the "half wages" statute. Codified as 46 U.S.C. §597, it was amended to provide:

> Every seaman on a vessel of the United States shall be entitled to receive on demand from the master of the vessel to which he belongs one-half part of the balance of his wages earned and remaining unpaid at the time when such demand is made at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended, and all stipulations in the contract to the contrary shall be void; Provided, Such a demand shall not be made before the expiration of, nor oftener than once in five days nor more than once in the same harbor on the same entry. Any failure on the part of the master to comply with this demand shall release the seaman from his contract and he shall be entitled to full payment of wages earned. And when the voyage is ended every such seaman shall be entitled to the remainder of the wages which shall be then due him, as provided in section 596 of this title: . . . *And provided further,* that this section shall apply to seamen on foreign vessels while in harbors of the United States, and the courts of the United States shall be open to such seamen for its enforcement . . . .

The dominant figure behind the new half wages provision was Andrew Furuseth, President of the Seaman's Union of America. Bickel, *Strathearn S.S. Co. v. Dillon,* 69 Harv. L. Rev. 1177 (1956) at 1200-01. Furuseth claimed that shipowners had largely enslaved American seamen in two ways: first, by signing men to long-term

contracts, advancing salary and thereby indebting them to the vessel; and, although arrest for desertion had earlier been abolished in the coastwise trade, using existing law to arrest seamen on American vessels for desertion in foreign ports, thereby tying them to their vessels when they were out of the country. *Id.* at 1180-81, 1183, 1201.

A. Abolishing Involuntary Servitude of Seamen On Foreign Vessels "While in Ports of the United States"

When the proposed legislation was before Congress in 1913, it was entitled in part:

> An act to abolish involuntary servitude imposed upon seamen in the Merchant Marine of the United States while in foreign ports and the involuntary servitude imposed upon the seamen of the Merchant Marine of foreign countries while in ports of the United States . . . .

Hearings on H.R. 23673, Senate Commerce Subcommittee, 62d Cong., 3rd Sess. (1912). The Act emancipated the American seaman by allowing him to break his contract in a foreign port and, under §597, demand one-half of his earned wages and leave the vessel. The other half of his earned wages was forfeited as liquidated damages for the breach of contract. Cong. Rec. Senate, Oct. 22, 1913, p. 5749, col. 2 (remarks of Senator Fletcher).

The "involuntary servitude imposed" on foreign seamen while in United States ports referred to our obligation to enforce the contracts binding seamen to foreign vessels when they were in our ports. Bickel, *supra*, at 1183. Sec .. 597, along with the new law abolishing arrest of f e gn seamen for desertion, was designed to

eliminate this condition as well. Oppressed seamen on foreign vessels were given a right to half wages in an American port, and the means thereby to leave their vessels when they reached our shores. *Id.* at 1190.

Furuseth wanted the right to half wages extended to seamen on foreign vessels not to protect them, but to help American seamen and revive the declining American merchant marine. *Monteiro v. Sociedad Maritima San Nicolas, S.A.*, 280 F.2d 568, 573, col. 2 (2d Cir. 1960) (Friendly, J.); Bickel, *supra*, at 1190. Furuseth's purpose, expressed by Senator Fletcher on the floor of the Senate, was:

> to equalize the wage cost of operating vessels, foreign and domestic, taking cargos or passengers from ports of the United States.

Cong. Rec. Senate, Oct. 22, 1913, p. 5748.

B. The Limited Method By Which Wage Equalization Was To Be Encouraged

The method by which wage equalization was to be accomplished was an indirect one. Even Furuseth did not urge Congress to directly require foreign ships trading in U.S. waters to pay their seamen the same wages U.S. seamen earned. Instead, he relied on the changes in desertion law and the "half wages" statute to accomplish this aim gradually.

These amendments, insofar as they applied to seamen on foreign vessels earning low wages, had the unabashed purpose of encouraging desertion when they reached American ports. In theory, the men would then ship on American vessels at higher wages. Foreign shipowners, to avoid losing seamen, would have to raise their wages if they wished to continue trading in American ports.

Furuseth Statement, Subcommittee, Commerce Committee, U.S. Senate 62nd Cong., 3rd Sess. 79 (Sept. 8, 1913). A committee report set out the theory:

> Under existing laws men may be and are employed at the ports where the lowest standard of living and wages obtain. The wages in foreign ports are lower than they are in the ports of the United States; hence the operating expenses of a foreign vessel are lower than the operating expenses of an American vessel. It is not proposed to prevent vessels from employing seamen in ports where they can secure them cheaper, but it is proposed by the bill to give the seamen the right to leave the ship when in safe harbor and in time this will result in foreign seamen engaged on vessels coming into ports of the United States being paid the same wages as obtain here, as a means of retaining their crews for the return voyage.

Bickel, *supra*, 69 Harv. L. Rev. at 1191, *quoting*, Report to H.R. 62nd Cong. 2d Sess. May, 1912. See also Furuseth Statement, Subcommittee, Commerce Commitee, U.S. Senate, 62nd Cong., 3rd Sess. 79 (Sept. 18, 1913). Bickel, *supra*, 69 Harv. L. Rev. at 1183.

Section 597 abrogated the traditional maritime rule that a vessel is governed by the law of its own country even when it is in a foreign port. *Id.* at 1185, 1194. Accompanying sections abrogated treaties providing for enforcement by American courts of foreign seamen's contracts. *Id.* at 1184-85, 1194-95. There were Congressional objections to these departures from international law and fears of retaliation by other countries. Hearings on H.R. 23673, Subcomm., Commerce Comm., Pt. II, p. 718, 720 (1912) (exchanges between Furuseth and Senators Nelson and Burton); Cong. Rec., Senate,

p. 5748, col. 1 (remarks of Senator Bacon); Bickel, *supra*, at 1191.

The response by the legislation's supporters was that international law permitted the United States to apply its own law to any person within its jurisdiction.

> We have the legal right to say to the world that no man shall be liable to arrest and to be restrained of his liberty in our ports because he sees fit to break a contract, onerous or otherwise.

Cong. Rec., Senate, p. 5749, col. 2 (emphasis supplied).

But they noted that the section was only

> applicable to foreign vessels while they are within the jurisdiction of our laws.

Cong. Rec. Senate, October 23, 1913, p. 5749, col. 1 (Remarks of Senator Fletcher); Bickel, *supra*, at 1193:

> . . . the United States gives this right to seamen on foreign vessels when they enter our ports; and that is practically the extent of our sovereign power.

See also the exchange between Furuseth and Senator Nelson, Hearings, *supra*, at 718-719.

C. No Evidence that the Balance of Wages Provision Was Intended to be Extended to Seamen on Foreign Vessels

In the 1915 revisions of the Act, R.S. 4529, the "full wages" provision, became 46 U.S.C. §596. Section 596 was almost identical to its predecessor, except that the penalty per day is raised from one day's pay to two day's pay. Section 596, now §10313(f), did not contain a clause extending it to foreign vessels. There appears to be almost no legislative history of this section and no suggestion that it was intended to play any role in the plan

to emancipate seamen and promote equalization of wages between American and foreign vessels. This may be because vessels that typically ended their voyages in United States ports were American vessels who would already be paying American wages. In addition, by definition, those few seamen on foreign vessels who were already going to terminate their voyages in the United States for other reasons did not need to be encouraged to do so by amending the full wages provision.

In 1931, in *The Sonderborg*, 47 F.2d 723 (4th Cir.), however, the Fourth Circuit held that §596 also applied to seamen on foreign vessels when in a port of the United States. The court relied on §597's reference to §596 and concluded that the two sections should be treated as one and both should be available to all foreign seamen in our harbors.[8] *The Sonderborg* opinion does not mention the legislative history of §597 and the purposes attributed to it by its sponsors.

In *Monteiro v. Sociedad Maritima San Nicolas, S.A.*, 280 F.2d 568, 572-73 (2d Cir. 1960), Judge Friendly, who was aware of the legislative history of §597, questioned the result in *The Sonderborg*. He noted, however, that the holding had been followed (without significant discussion) by his and other circuits and was therefore binding. As part of the 1983 codification, the full wages provision was expressly extended to foreign seamen in §10313(i).

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[8]The language on which the Court relied, however, had been in the 1898 version of the half wages provision when there was no intent to extend either R.S. 4530 or 4529 to the seamen on foreign vessels.

D. Lessons from the Legislative History

In sum, there is no legislative history that the full wages provision – now §10313(f) – was extended to foreign vessels to equalize wages. As for the half wages provision, it was critical to the thinking behind its extension to such vessels that it apply only while they were in our ports. This was because (a) the purpose was to get the seamen to leave while in our ports, not some other country's, so that they could reship on American vessels at U.S. wages, and (b) to limit the encroachment of U.S. laws on foreign citizens to the area in which the U.S. indisputably had jurisdiction under international law.

Congress – with the vigorous assistance of the Immigration and Naturalization Service – has itself nullified the purposes of the 1915 revision by preventing the discharge in the U.S. of foreign seamen and preventing their re-shipment on U.S. vessels. 8 U.S.C. §1281 *et seq.* The theory of the revision in any event was destined to failure. The American merchant marine has continued to decline and Congress has done nothing, except in times of emergency, to halt that decline. Indeed, there is substantial evidence that lower cost shipping benefits American farmers, businesses and consumers. The equalization purpose of some legislators in 1915, therefore, cannot be viewed as a legitimate basis for countermanding the plain language and structure of the Act today.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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April 9, 1993

APPENDIX I

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 90-165 JU

COMPLAINT (BREACH OF MARITIME CONTRACT *IN REM* AND IN PERSONAM AND FOR DAMAGES)

I HYEON SU, JO SEONG GU, GIM YEONG HO, PARK MIN HO, JEONG JU GOANG, KIM KYONG SU, KIM IN SOK, KIM CHUNG IL, BAG HAN KIL, O HAN SEON, BARG YEONG PAL, KIM OG NAM, PYEON YUN SU, JI JE JE, LEE SIL GWANG, SON CHI IL, SEO JEOM TAE, KA CHAE HO, CHU CHAE SOK, PARK SUNG OK, CHOI WEON IL, and FEDERATED KOREAN SEAMEN'S UNION (hereinafter "FKSU"),

Plaintiffs,

v.

M/V SOUTHERN ASTER, *In Rem,* and
SOUTHERN ASTER NAVIGATION, S.A.,

Defendants.

Plaintiffs allege that:

NATURE OF CASE

1. This is an admiralty case to recover unpaid wages, penalty wages, and other damages for the former crew of Defendant, M/V Southern Aster.

JURISDICTION

2. Plaintiffs, I HYEON SU, JO SEONG GU, GIM YEONG HO, PARK MIN HO, JEONG JU GOANG, KIM KYONG SU, KIM IN SOK, KIM CHUNG IL, BAG HAN KIL, O HAN SEON, BARG YEONG PAL, KIM OG NAM, PYEON YUN SU, JI JE JE, LEE SIL GWANG, SON CHI IL, SEO JEOM TAE, KA CHAE HO, CHU CHAE SOK, PARK SUNG OK, and CHOI WEON IL, are persons of the full age of majority, residents of and domiciled in the Republic of Korea, and they appear herein individually through their agent and representative, FEDERATION OF KOREAN SEAFARERS' UNIONS (hereinafter "FKSU").

3. Jurisdiction is founded on United States Const. Art. III, pursuant to federal jurisdiction over the claims in admiralty and maritime, and pursuant to federal question jurisdiction; §1333 of the Judicial Code, 28 U.S.C. §1333; §101212(i) of the Shipping Code, 46 U.S.C. §10313(i); and the General Maritime Law of the United States of America.

CLAIM FOR RELIEF

4. Defendants herein are:

M/V SOUTHERN ASTER, a vessel that is or will be during the pendency of this action within the jurisdiction of this Court; and

SOUTHERN ASTER NAVIGATION, S.A., a foreign corporation, not registered in but doing business in the State of Oregon, more particularly within the territorial jurisdiction of the United States District Court for the District of Oregon;

who are the owners, managers, operators and/or agents of the vessel M/V Southern Aster, which flies the flag of Panama, said vessel being within the territorial waters of the United States District Court for the District of Oregon at the time of breach of a maritime contract.

5. All individual Plaintiffs (hereinafter "Seamen Plaintiffs") were employed aboard the M/V Southern Aster as seamen in various capacities commencing on or about March 16, 1988, with the exception of Park Sung Ok and Choi Weon Il who were employed April 25, 1988 and August 26, 1988, respectively. Attached hereto as Exhibit "A", pages 1 through 3, are the shipping articles which constitute the seamen's individual employment contracts obligating Defendants to pay the salaries and benefits specified therein in accordance with the ITF/FKSU Collective Bargaining Agreement.

6. Seamen Plaintiffs were not paid in accordance with the terms of their contracts or shipping articles, or the Special Agreement and Collective Agreement, but were paid at a lesser rate by the Defendants despite Seamen Plaintiffs' requests for their full wages each month and at the termination of each voyage. In order to receive any portion of their rightful wages, Seamen Plaintiffs were

required to sign monthly two sets of portage bills or wage receipts, one set being false acknowledging receipt of the amount of wages due under Seamen Plaintiffs' contract, and the other set reflecting the actual amount paid to each Seamen Plaintiff.

7. As of February 20, 1990, it is unknown how much each Seamen Plaintiff was paid in wages during their employment on board the M/V Southern Aster; however, said amount will be ascertained through discovery. Nevertheless, on information and belief, Seamen Plaintiffs are entitled to significant sums of back wages, believed to be collectively in the aggregate sum of approximately $250,000.00, which were withheld in violation and in breach of the shipping articles and contracts.

8. Section 10313 of the Shipping Code (46 U.S.C. §10313) provides, in pertinent part, as follows:

> "(f) At the end of a voyage, the master shall pay each seaman the balance of wages due the seaman within 24 hours after the cargo has been discharged or within 4 days after the seaman is discharged, whichever is earlier. When a seaman is discharged and final payment of wages is delayed for the period permitted by this subsection, the seaman is entitled at the time of discharge to one-third of the wages due the seaman.
>
> "(g) When payment is not made as provided under subsection (f) of this section without sufficient cause, the master or owner shall pay the seaman 2 days' wages for each day payment is delayed.
>
> "* * * * *
>
> "(i) This section applies to a seaman on a foreign vessel when in a harbor to the United States. The Courts are available to the seaman for the enforcement of this section."

9. Defendant, M/V Southern Aster, is a foreign vessel in a harbor of the United States.

10. Seamen Plaintiffs were not paid by the Defendants herein for their full wages and back pay in accordance with the terms of their contracts and shipping articles pursuant to the provisions of 46 U.S.C. §10313. The Defendants intentionally refused to pay the full wages due Seamen Plaintiffs after each and every voyage in which cargo was discharged and at the termination of the Seamen Plaintiffs' employment.

11. By the aforesaid conduct, Defendants intentionally, willfully, and wrongfully violated Seamen Plaintiffs' rights under 46 U.S.C. §10313(e) and, accordingly, Seamen Plaintiffs are entitled to two (2) days' pay for each and every day during which payment has been delayed. The amounts of these penalty wages due to February 28, 1990, for all Seamen Plaintiffs are the collective sum of $13,010,029.85 all as shown in Exhibit "B" attached hereto. The penalty wages will continue to accrue and Exhibit "C" attached hereto shows a month-by-month increase in said penal wages to December, 1991, when the collective sum due is $28,821,395.23.

12. The Defendants' conduct in paying them at a rate lower than stipulated in the shipping articles and requiring Seamen Plaintiffs to sign two sets of wage receipts constitutes fraud and is willful and wanton conduct in gross disregard of Seamen Plaintiffs' rights and constitutes a maritime tort under the General Maritime Law of the United States of America. Defendants' willful and wanton conduct warrants the imposition of compensatory and punitive damages herein in the sum of $300,000 each ($6.6 million collectively, $3,300,000 as compensatory damages and $3,300,000 as punitive damages) in

addition to the wages and penalty wages sought above, plus attorneys' fees and all costs of this proceeding.

13. By virtue of Defendants' failure to timely pay the back wages due to Seamen Plaintiffs, and the Defendants' intentional bad faith conduct warranting compensatory and punitive damages, a maritime lien has arisen against the vessel M/V Southern Aster, a vessel flying the flag of Panama, and whose call sign is 3EJJ6 and whose official number is 17750-88; whose gross weight is 14,286 tons, and net weight 8,499 tons, which Seamen Plaintiffs seek to enforce in this suit.

14. Seamen Plaintiffs allege upon information and belief that after due and diligent search that the Defendant, herein, Southern Aster Navigation, S.A., is not present within this District, but that their chattel, the M/V Southern Aster, is now or will be present within this District during the pendency of this action. Seamen Plaintiffs therefore request that a writ *in rem* issue herein arresting the said M/V Southern Aster, pursuant to Rule C of the Federal Supplemental Rules for Admiralty and Maritime Claims.

15. Plaintiff FKSU is a labor union licensed in the Republic of Korea and is authorized to bring suit in the name of seafarers on board the M/V Southern Aster. The crew members on board the M/V Southern Aster granted this authority to FKSU by their membership in said union, and the Defendants acknowledged and agreed in their Collective Bargaining Agreement that FKSU has the right to represent said crew members and bring legal action in their names on their behalf.

WHEREFORE, on their Claim for Relief, Seamen Plaintiffs, I HYEON SU, JO SEONG GU, GIM YEONG HO, PARK MIN HO, JEONG JU GOANG, KIM KYONG SU,

KIM IN SOK, KIM CHUNG IL, BAG HAN KIL, O HAN SEON, BARG YEONG PAL, KIM OG NAM, PYEON YUN SU, JI JE JE, LEE SIL GWANG, SON CHI IL, SEO JEOM TAE, KA CHAE HO, CHU CHAE SOK, PARK SUNG OK, CHOI WEON IL, and FEDERATION OF KOREAN SEAFARERS' UNIONS, pray for Judgment as follows:

1. Against the Defendants, M/V Southern Aster, *In Rem,* and Southern Aster Navigation, S.A., *in personam,* jointly and severally, for the past due wages unpaid as stated in the Complaint, (Paragraph 7);
2. Against the Defendants, M/V Southern Aster, *In Rem,* and Southern Aster Navigation, S.A., jointly and severally *in personam,* for an amount equal to two (2) days' pay for each and every day in which payment has been delayed to February 28, 1990 (as shown in Paragraph 11, Exhibit "B" of this Complaint) in the collective sum of $13,010,-029.85;
3. Against the Defendants, M/V Southern Aster, *In Rem,* and Southern Aster Navigation, S.A., *in personam,* jointly and severally, for an additional amount equal to two (2) days' pay for each and every day in which payment has been delayed for wages due Plaintiffs to date of payment; the amount becoming due as of December, 1991 (as shown in Paragraph 11, Exhibit "C"), in the collective sum of $28,821,395.23;
4. Against the Defendants, M/V Southern Aster, *In Rem,* and Southern Aster Navigation, S.A., jointly and severally *in personam,* for punitive damages in the sum of $300,000 each (collectively in the sum of $6,300,000), reasonable attorneys fees, interest, and costs;

5. A writ *in rem* issue for the arrest of the M/V Southern Aster, and that all persons claiming any interest therein be cited to appear and answer the matter aforesaid, and that said vessel be condemned and sold to satisfy Plaintiffs' damages; and
6. Against the Defendants, M/V Southern Aster, *In Rem*, and Southern Aster Navigation, S.A., for the amount of their respective claims, with interest, costs, penalties, and attorneys' fees, and that the M/V Southern Aster be sold to pay the same.

RESPECTFULLY SUBMITTED this 21st day of February, 1990.

LAW OFFICES OF RICHARD J. DODSON

By/s/ Richard J. Dodson
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By /s/ John W. Buehler
John W. Buehler
OSB #77128

Attorneys for Plaintiffs

PANAMA
ROL DE TRIPULACION DEL BUQUE
VESSEL CREW LIST

No. 10047-C

"It is agreed that the wages and employment conditions of all seafarers serving on board the above vessel shall be governed by the terms of the current ITF/FKSU agreement attached below with effect from 16th, Mar., 1988.

The owners also agree that despite whatever may be printed or written in these articles by any seafarer at the time of discharge from the ship shall not amount to a release of the owners and/or the vessel from any claim for wages of any other claim of the seafarer which is outstanding at discharge but shall amount only to an acknowledgement of discharge and receipt of wages at discharge shall not be treated as full and final settlement of all outstanding wages."

Name of Vessel: SOUTHERN ASTER
Master: YASUO UCHINO

[SEAL]

/s/ Jean A. Esteifeaut O.
Embajador de Panama
Ancargado de Las Aboutus Consulares
Seoul, Korea

	Posición a bordo Position on board	Nombre y apellido Complete name Numero de certificado o carnet marino Certificate or Competence or seafarers card number	Lugar de nacimiento Birth place Nacionalidad Nationality	Edad Age No. de pasaporte Passport No	Domicilio Home address	Nombre del pariente más próximo Next of Kin Dirección Address
1	CAPT	YASUO UCHINO	KAGOSHIMA PREF. JAPAN	54 MH-1168483	32-17, MEGASHI ICHIKI CHO. HIOKI GUN, KAGOSHIMA PREF. JAPAN	SATSUKO UCHINO SAME AS HOME ADD
2	C/O	HYEON SU. I	SEOUL KOREA	33 MP-810-22469	GARAK SIYEONG APT. 66 DONG. 107 HO. GARAK DONG. KANG DONG KU. SEOUL. KOREA	ANGI. KIM SAME AS HOME ADD
3	2/O	SEUNG GU. IO	SEOUL KOREA	28 MS-832-31206	NO. 452-40, MINGMI-1 DONG, NAMKU. PUSAN KOREA	EUI SIM, SEO SAME AS HOME ADD
4	3/O	YEONG HO GIM	PUSAN KOREA	27 BS-830-49174	NO. 554. 3TONG. 1BAN. CHORYANG DONG. DONG KU. PUSAN. KOREA.	SU SEONG. KIM SAME AS HOME ADD
5	C/E	SUSUMU TAKATA	KAGAWA PREF. JAPAN	51 MM-3430995	2232-2. NAKAHIME. OHNOMARA CHO. MITOYOGUN. KAGAWA PREF. JAPAN	TERUKO TAKATA SAME AS HOME ADD
6	1/E	MIN HO PARK	KWANGJU KOREA	33 PM-754-83262	#1045-34. 8 DONG. WEOLSAN DONG. SEOGU. KWANGJU. KOREA	GYEONG SUN, HAN SAME AS HOME ADD
7	2/E	JI GUAN. JEONG	GYEONGBUK KOREA	31 PM-782-83208	JEONPO APT. 5 DONG 410 HO. JEONPO 1 DONG. JIN KU. PUSAN. KOREA	JEONG LIM, LEE SAME AS HOME ADD
8	3/E (ELELT)	KYONG SU. KIM	JEONBUK KOREA	22 MP-867-22038	NO. 157-17. 3 TONG. 4BAN. 16A. NAM JUNG DONG. IRI. KOREA	YEONG PIL, KIM SAME AS HOME ADD
9	R/O	IN SOK. KIM	SEOUL KOREA	25 MP-8444-22228	NO. 389-6. SSANGMUN DONG. TOBONG KU. SEOUL, KOREA	SUN HEUI, KIM SAME AS HOME ADD
10	BSN	CHUNG IL KIM	GYEONGNAM KOREA	52 BS-712-50212	NO. 83-9. SAJIK 2 DONG. DONG RAE KU. PUSAN. KOREA	SANG SUN, NO SAME AS HOME ADD
11	ABA	HAN KIL. BAE	GYEONGGI KOREA	38 IC-745-10173	NO. 267. JEONGWANGDONG. GUNJAM/EON. SIHEUNGGUN. GYEONGGI. KOREA	YEONG JA, KOM SAME AS HOME ADD
12	ABB	HAN SEON. O	JEJUDO KOREA	36 BS-506-45783	2 TONG. 5BAN. NO. 28. 3GA. NAM HANG DONG. YEONG DEOK. PUSAN	YUN SUN, KIM SAME AS HOME ADD

Salario Salary	Sumas adelantadas del Salario Salary advance	Duración del Contrato Date of conclusion of contract	Puerto de Embarque Port of Enrolment Firma del tripulante Signature of crew member	Lugar y Fecha Place and Date	Nombre y firma del Cónsul Name and signature of the Consul
AS PER AJU'S LABOUR AGREEMENT				SHIMIZU. JAPAN MAR. 16TH. 1988	
1.544.40				- do -	
1.064.80				- do -	
937.20				- do -	
AS PER AJU'S LABOUR AGREEMENT				- do -	
1.544.40				- do -	
1.064.80				- do -	
937.20				- do -	
1.544.40				- do -	
1.064.80				- do -	
770.00				- do -	
655.60				- do -	

Puerto de Desembarco Port of Discharge Firma del tripulante Signature of crew member	Lugar y Fecha Place and Date	Nombre y firma del Cónsul Name and signature of the Consul
	SHIMIZU. JAPAN JAN 22ND. 1989	CONSULADO GENERAL DE PANAMA KOBE JAPON
	GAMAGORI. JAPAN MAR 15TH. 1989	CONSULADO GENERAL DE PANAMA KOBE JAPON
	"	CONSULADO GENERAL DE PANAMA KOBE JAPON
	"	CONSULADO GENERAL DE PANAMA KOBE JAPON
	OSAKA JAPAN 24TH JUNE 1989	
	GAMAGORI. JAPAN MAR 15TH. 1989	CONSULADO GENERAL DE PANAMA KOBE JAPON
	"	CONSULADO GENERAL DE PANAMA KOBE JAPON
	"	CONSULADO GENERAL DE PANAMA KOBE JAPON
	"	CONSULADO GENERAL DE PANAMA KOBE JAPON
	"	CONSULADO GENERAL DE PANAMA KOBE JAPON
	OSAKA. JAPAN AUG. 26TH. 1988	CONSULADO DE PANAMA OSAKA JAPON

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	Posición a bordo Position on board	Nombre y apellido Complete name Número de certificado o carnet marino Certificate or Competence or seafarers card number	Lugar de nacimiento Birth place Nacionalidad Nationality	Edad Age No. de pasaporte Passport No.	Domicilio Home address	Nombre del pariente más próximo Next of Kin Dirección Address	Salario Salary	Sumas adelantadas del Salario Salary advance	Duración del Contrato Date of conclusion of contract	Puerto de Embarque Port of Enrolment Firma del tripulante Signature of crew member	Lugar y Fecha Place and Date	Nombre y firma del Cónsul Name and signature of the Consul	Puerto de Desembarco Port of Discharge Firma del tripulante Signature of crew member	Lugar y Fecha Place and Date	Nombre y firma del Consul Name and signature of the Consul
1	A B C	YEONG PAL, BARK	GYEONGNAM	29	NO. 17-23, YANG JEONG 4 DONG, JIN KU, PUSAN, KOREA	SEON MEUI, YONG	655.60				SHIMIZU, JAPAN MAR. 16TH. 1988			GAMAGORI, JAPAN MAR. 14TH. 1988	CONSULADO GENERAL DE PANAMA KOBE, JAPON
			KOREA	BS 827-50685		SAME AS HOME ADD									
2	O.S	CG NAM, KIM	JEONNAM	37	NO. 145, BIRI, MEUKSAN DO, SINAN GUN, JEONNAM KOREA	HYEONG DAN, KIM	558.80				do			"	CONSULADO GENERAL DE PANAMA KOBE, JAPON
			KOREA	BS-770-43733		SAME AS HOME ADD									
3	O.S	YUN SU, PYEON	PUSAN	23	NO. SAN 62, 25 TONG 1 BAN, BEOM 6 DONG, DONG KU, PUSAN KOREA	JONG WEON, PYEON	558.80				do			OSAKA, JAPAN APR. 25 1988	CONSULADO DE PANAMA 12-26 AM
			KOREA	BS-845-41731		SAME AS HOME ADD									
4	REPAIR MAN	JE JE, JI	PUSAN	40	NO. 15-3, 3-GA, SINSEON DONG, YEONGDO KU, PUSAN, KOREA	SUN NEK, JEONG	1,016.40				do			GAMAGORI, JAPAN MAR 15TH 1988	CONSULADO GENERAL DE PANAMA KOBE, JAPON
			KOREA	CM-[illegible]-37642		SAME AS HOME ADD									
5	O.L.R	SIL GWANG LEE	GYEONGBUK	37	NO. 13-1007, 5 TONG 5 BAN, GAMCHEON 2 DONG, SAHA KU, PUSAN, KOREA	IL NYEO, KIM	770.00				do			"	[illegible]
			KOREA	BS-159-41809		SAME AS HOME ADD									
6	O.L.R	CHI IL, SON	PUSAN	33	NO. 29, NAM MANG-DONG, YEONGDO KU, PUSAN, KOREA	SAM SUN, JEON	655.60				do			"	CONSULADO GENERAL DE PANAMA KOBE, JAPON
			KOREA	BS-852-41[illegible]4		SAME AS HOME ADD									
7	C/S	JEOM TAE SEL	PUSAN	36	NO. 350-27, 4 TONG, 4 BAN, GOBJEONG 2 DONG, SAHA KU, PUSAN, KOREA	SUN JA, KIM	1,016.40				do			"	CONSULADO GENERAL DE PANAMA KOBE, JAPON
			KOREA	BS-781-42701		SAME AS HOME ADD									
8	C/K	CHAE HO KA	CHUNGNAM	24	NO. 43, 2 GU, YANG DAERI, SEOSAN EUB, SEOSAN GUN, CHUNGNAM, KOREA	GONG NO, KA	770.00				do			SHIMIZU, JAPAN DEC 2, 1988	CONSULADO DE PANAMA 12-26 AM
			KOREA	BS-883-42933		SAME AS HOME ADD									
9	S/B	CHAE SOK, CHU	JEONNAM	20	NO. 149-1, 6 GU, GUNNAEKI, WAN DO EUB, WANDO GUN, JEONNAM, KOREA	YONG BAE, JU	558.80				do			GAMAGORI, JAPAN MAR 15TH 1988	CONSULADO GENERAL DE PANAMA KOBE, JAPON
			KOREA	WD-867-240614		SAME AS HOME ADD									
10	O.S	SUNG CK PARK	JEONNAM	26	NO 1206, SUNGKYOK, MUNNAE MYEON, HAENAM GUN, CHUNNAM KOREA	SANG NAM, PARK	558.80				OSAKA, JAPAN APR 25 1988			"	CONSULADO DE PANAMA 12-26 AM
			KOREA	53 [illegible]-26		SAME AS HOME ADD									
11	ABB	WEON IL, CHOI	GYEONGNAM	47	3 1ST-1 MIJORI, SAMDANGMYON, NAMHAE GUN, GYONGNAM KOREA	YEONG SUN, LEE	770.00				OSAKA, JAPAN AUG 26 1988			"	CONSULADO GENERAL DE PANAMA KOBE, JAPON
			KOREA	BS MR-41401		SAME AS HOME ADD									
12	CAPT	TAKAMASA AZUMA	PREF. TOTTORI	53	M. 2CHOME CHI-CHO, SAKAIMINATO CITY, TOTTORI-PREF JAPAN	AGUNA KYOKO	[illegible]	Jan. 21st 1989			SHIMIZU, JAPAN JAN 21ST 1989				
			JAPAN	PASSPORT No. TH [illegible]		SAME AS HOME ADD									

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[Exhibits B and C to Plaintiffs' Complaint, which appear as pages 13-16 of the Complaint, have been omitted because they consist solely of elaborate mathematical tables showing claimed penalty damages for each plaintiff, and these tables have no relevance to the question presented in the Petition for Certiorari.]

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

I HYEON SU, JO SEONG GU, GIM YEONG HO, PARK MIN HO, JEONG JU GOANG, KIM HYONG SU, KIM IN SOK, KIM CHUNG IL, BAG HAN KIL, O HAN SEON, BARG YEONG PAL, KIM OG NAM, PYEON YUN SU, JI JE JE, LEE SIL GWANG, SON CHI IL, SEO JEOM TAE, KA CHAE HO, CHU CHAE SOK, PARK SUNG OK, CHOI WEON IL, and FEDERATED KOREAN SEAMEN'S UNION (hereinafter "FKSU")

Plaintiffs

STATE OF LOUISIANA
COUNTY OF EAST BATON ROUGE

BEFORE ME, the undersigned authority, personally came and appeared, Richard J. Dodson, who after being by me first duly sworn, did depose and say:

That I have been appointed and retained, and I am presently serving as legal counsel in the United States of America for the Federated Korean Seamen's Union and in behalf of said union and its members I have been requested to initiate the instant proceeding. Further, I have been provided information by my client which forms the grounds for this proceeding and on the basis of the information so received and provided I have read the foregoing Petition and that all of the allegations of fact contained therein are stated in accordance with the information provided by my client and are true and correct to the best of my knowledge, information, and belief.

/s/ Richard J. Dodson
RICHARD J. DODSON

SWORN TO AND SUBSCRIBED before me this 19th day of February, 1990.

/s/ Richard P. Bullock
NOTARY PUBLIC
My commission expires
at life

APPENDIX II

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. 90-165-MA

I HYEON SU, JO SEONG GU, GIM YEONG HO, PARK MIN HO, JEONG JU GOANG, KIM HYONG SU, KIM IN SOK, KIM CHUNG IL, BAG HAN KIL, O HAN SEON, BARG YEONG PAL, KIM OG NAM, PYEON YUN SU, JI JE JE, LEE SIL GWANG, SON CHI IL, SEO JEOM TAE, KA CHAE HO, CHU CHAE SOK, PARK SUNG OK, CUOI WEON IL, and FEDERATED KOREAN SEAMEN'S UNION (hereinafter "FKSU"),

Plaintiffs,

v.

M/V SOUTHERN ASTER, In Rem, and SOUTHERN ASTER NAVIGATION, S.A.,

Defendants.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MALCOLM F. MARSH

APPEARANCES:
For the Plaintiffs: Jerry Dodson (telephonically); John Buehler

For the Defendants: Kathleen A. McKeon, Robert Sanders; Todd Zilbert

(Friday, February 23, 1990, 10:54 a.m.)

PROCEEDINGS

THE COURT: Let's everybody identify yourself on the record. Mr. Dodson, if you'd identify yourself.

MR. DODSON: Yes, Your Honor. I'm Jerry Dodson for the Plaintiffs.

MR. BUEHLER: John Buehler, also appearing for the Plaintiffs.

MS. McKEON: Kate McKeon, appearing for Defendants.

MR. SANDERS: Robert Sanders, appearing for Defendants.

MR. ZILBERT: Todd Zilbert, appearing for Defendants.

* * * *

THE COURT: All right. Now, we have two other issues that you need to address. The first is the verification of the complaint. My choices there are to either hold that I do not see good cause to require a delay in things or that I do bring about what has been requested by the Defendants for an affirmation by each of the Plaintiffs.

Now, in your information that you've given to me, Mr. Dodson, you have set forth that that is being accomplished in Korea by your paralegal and that you would expect to have that information available to you, I can't remember, within a week or so?

MR. DODSON: I believe I said two weeks, Your Honor.

* * * *

THE COURT: Are there any other matters you want to bring up?

MS. McKEON: No, Your Honor.

THE COURT: Mr. Dodson?

MR. DODSON: Yes, Your Honor, just one matter. As a matter of verification, I can have delivered to the Court by 5 o'clock Monday a verification signed by the agent attorney in fact of these 21 seafarers, president of the union in deed who signed the authorization to sign the suit. So he, as their agent, can sign the verification in lieu of me as their counsel, and he would sign it as their agent attorney in fact and the owner. It will take two weeks.

These union members are located throughout different parts of Korea. And it's a matter of seeing them, having them review in their native language the complaint and then obtaining verification from them from a notary. And that is no small task, Your Honor. Give you an example.

In Bosoon, a city of, oh, I think I around two million, there's one notary public. Indeed for the entire country of South Korea there's only something like 400 throughout. They have a very restricted stiff legal system there, Your Honor.

* * * *